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MISSISSIPPI LAW JOURNAL

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STATE TAXATION OF INTERSTATE SALES*

CHARLES L. B. LOWNDES**

The citizens of a state which has a sales tax may confine their minor purchase to local sources. They are apt, however, to go bargain hunting abroad for their major necessities: to order goods to be shipped into them from other states. These transactions constitute interstate commerce and under the presently prevailing decisions of the United States Supreme Court are probably immune from state sales taxation.[1]

The effect of this immunity upon local business is perhaps more serious than the loss to the state revenues. It may appear that the local merchant should offset his loss in interstate trade, due to his state's sales tax, by an increased interstate dealing with the citizens of other states, who are seeking to avoid their sales taxes. But as Mr. Perkins points out in his excellent discussion of this subject in a recent issue of the North Carolina Law Review[2] matters will not work out in precisely this fashion. Interstate buying tends to seek the larger sources of supply. It favors the nationally known distributor and the nationally advertised product. In interstate buying and selling the large commercial states should prosper at the expense of less industrialized areas. The nationally known distributor and the widely advertised commodity profit to the detriment of the small local merchant and the local product.

It is obvious that a state sales tax is not an uniformly appealing proposition, unless some method can be devised to reach interstate as well as local sales. The purpose of this paper is to discuss the proposed

*The substance of this article was given in an address to the National Tax Association Conference, October, 1934.

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[1]My colleague, Professor D. B. Maggs, feels that there is some possibility that the Supreme Court might uphold a non-discriminatory state tax on interstate sales. In this connection a recent decision of the Pennsylvania Supreme Court is interesting. See *Commonwealth* v. *Wiloil Corporation,* 173 Atl. 404 (Pa. 1934).

[2]E. M. Perkins, *The Sales Tax and Transactions in Interstate Commerce,* (1934) 12 N. C. L. REV. 99.

federal statute[3] which will authorize a tax upon interstate sales by the buyer's state. It may be well to comment briefly upon some of the constitutional aspects of this type of legislation and then to hazard some conclusions about its probable efficacy.

From the viewpoint of the Federal Constitution there are two major obstacles to state taxation of interstate sales. The first difficulty comes from the clause giving Congress power to regulate commerce between the states. The second, which is no less real, although it seems to have excited less considered attention, is a jurisdictional one, which is related to the Federal Constitution through the somewhat elastic medium of the Fourteenth Amendment.

There is no explicit provision in the Federal Constitution which denies the power to regulate interstate commerce to the States.[4] The negatives on state action have been deduced by the Courts from the positive grant to Congress of the power in conjunction with the judicial ideal of the national interest to be effectuated by the grant.

State legislation which is in conflict with an explicit Congressional regulation of interstate commerce cannot be sustained. Not only would the grant of power to regulate commerce between the states be seriously impaired unless it carried this implication of federal supremacy, but the Federal Constitution provides explicitly that the laws of the United States shall be the supreme law of the land.[5] The doctrine that the states cannot act where Congressional regulation has already occupied the field is a somewhat fictitious extension of the same idea.

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[3]The proposed statute which is entitled *"A Bill to Regulate Sales in Interstate Commerce"* reads as follows: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That as a regulation of interstate commerce, all taxes or excises levied by any State upon sales of tangible personal property, or measured by sales of tangible personal property, may be levied upon, or measured by, sales of like property in interstate commerce, by the State into which the property is moved for use or consumption therein, in the same manner and to the same extent that said taxes or excises are levied upon or measured by sales of like property not in interstate commerce; Provided, That no State shall discriminate against sales of tangible personal property in interstate commerce, nor shall any State discriminate against the sale of products of any other State: Provided further, That no State shall levy any tax or excise upon, or measured by, the sale in interstate commerce of tangible personal property transported for the purpose of resale by the consignee: Provided further, That no political subdivisions of any State shall levy a tax or excise upon, or measured by, sales of tangible personal property in interstate commerce.

"For the purposes of this section a sale of tangible personal property transported, or to be transported, in interstate commerce shall be considered as made within the State into which such property is to be transported for use or consumption therein, whenever such sale is made, solicited, or negotiated in whole or in part within that state."

[4]The Federal Constitution merely provides that Congress shall have power "To regulate commerce with foreign nations, and among the several States, and with Indian tribes." Art. I, sec. 8.

[5]Art. VI.

In the absence of any action by Congress, the validity of state legislation is determined by a judicial judgment as to the probable effect of the state statute upon the national policy of free intercourse between the states. The result of the Court's decision to deny the competence of state action in a given case, is usually verbalized under the formula that the state undertook to legislate with respect to a matter which demands an uniform rule and which, therefore, falls within the exclusive power of Congress. The customary verbalization, where state legislation is tolerated, is that the state has not undertaken to affect a subject-matter necessitating national uniformity, and therefore, the state legislature has acted competently under a concurrent power, which is only subordinate to an explicit exercise of the Congressional will.

The surface difficulty with the proposal to have Congress authorize state taxation of interstate sales is that this appears to be an attempt upon the part of Congress to submit to the regulation of the states a subject which has usually been categorized as one within the exclusive power of Congress. It is open to the attack of an unconstitutional delegation to the States of the Congressional power over interstate commerce. This objection is not insuperable.

A similar difficulty was successfully surmounted in the state prohibition cases. After the Supreme Court had held that the dry states could not constitutionally regulate interstate shipments of liquor.[6] Congress passed the Wilson and the Webb-Kenyon Acts which subjected interstate traffic in liquor to the state prohibition laws. The Supreme Court upheld both enactments[7] meeting the argument of an unconstitutional delegation of power by the observation that Congress had not delegated the power to regulate interstate commerce to the states, but had itself exercised this power by divesting interstate shipments of liquor of their character as interstate commerce.

It is obvious that the same reasoning would sustain a federal statute authorizing a state sales tax on interstate sales. As an abstract intellectual concept it is possible to view such a statute as a delegation of the Congressional power over interstate commerce, or as a Congressional regulation of interstate commerce by divesting such sales of their character as interstate commerce and their consequent immunity from state taxation. The rejoinder to a possible objection that this same reasoning would authorize a tax by the seller's state as well as that of the buyer, and encourage double taxation, might be, that the immunity has not been stripped to that extent.

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[6]Bowman v. Chicago & Northwestern Ry. Co., 125 U. S. 465 (1888); Leisy v. Hardin, 135 U. S. 100 (1890).

[7]In re Rahrer, 140 U. S. 545 (1891) (Wilson Act); Clark Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311 (1917) (Webb-Kenyon Act).

There are, of course, inherent logical difficulties in the reasoning of the liquor cases. In order to sustain state regulation of the interstate liquor traffic, the Supreme Court had to uphold the constitutionality of the state laws as well as that of the Wilson and Webb-Kenyon Acts. Conceivably the federal laws might be treated as a regulation of interstate commerce by the Federal Legislature. But if we start with a basic premise that the power of Congress to regulate such shipments is exclusive, it is difficult to perceive the analytical basis for sustaining the state laws. Upon the hypothesis that the States had no original power to regulate interstate shipments of liquor, the conclusion that the state laws which did regulate this traffic were the exercise of a delegated power seems almost inevitable.

The argument by which the Court met the objection that Congress had delegated its power to regulate interstate commerce seems to have been this. Congress had not delegated the power over interstate commerce, but had itself exercised that power by divesting interstate shipments of liquor of their character of interstate commerce. Since such shipments were thus removed from the stream of commerce, the states could regulate them under their police powers without any exercise of the commerce power. The vice in this approach is that it presupposes an extremely unreal conception of interstate commerce.

Interstate shipments of liquor continued to move across state lines after the Wilson Act and the Webb-Kenyon Act. It is not unreasonable to say that they had been divested of their immunity from state regulation. But to say that they were no longer interstate commerce; that they have been divested of their character of interstate commerce, involves an extremely legalistic definition of such commerce. It necessitates a definition of interstate traffic which prescinds entirely from any factual basis. It is an illustration of the most extreme type of legal conceptualism, which is in general disrepute today with constitutional scholars.

To escape a delegation of power in the state prohibition cases the modern analysts of constitutional jurisprudence have felt it necessary to post an original power over interstate commerce in the States, a theory which is subsumed under the title of the "Silence of Congress." This view, which is advocated by Mr. Perkins in his article on this subject, is that the states have the power to regulate interstate commerce as long as this does not conflict with Congressional regulation. The conflicting Congressional regulation may be either explicit or implied from the silence of Congress in a field where uniform treatment is desirable. The corollary from this theory for our purpose is, of course, that an explicit congressional assent to state taxation of interstate sales would be constitutional.

Manifestly, however, the silence of Congress is a pure fiction, designed to rationalize a result rather than to reflect accurately the actual judicial process. In articulating the silence of Congress, the Court consciously or unconsciously projects its own views as to the effect of state action upon the national interest in promoting a freely flowing commerce between the states. The silence of Congress is the dictum of the Court.

In Constitutional Law it is wise to differentiate the legalistic arguments which may be used to rationalize results, from the moving considerations which determine results. Two facts are important here.

There are a few powers of Congress which under the Constitution are explicitly exclusive, either because they are given in terms of an exclusive grant, or because the states are explicitly denied their exercise. The commerce power is not one of them. When a state regulation which affects interstate commerce is invalidated, this is done because the Court feels that it is of a type which cannot be reconciled with the national policy of an unfettered commercial intercourse between the States.

Congressional authorization of state regulation of interstate commerce is tantamount to a declaration by the National Legislature that this does not conflict with national interest. The essential problem in connection with Congressional action of this type is who is the final arbiter of the exigencies of national interest in this field, Congress or the Supreme Court. To hold such a statute unconstitutional the Court must pit its judgment against that of Congress and declare in effect that it is the ultimate arbiter of national policy. It is conceivable that the Court might do this. It did something very close to it in the admiralty cases, which involved a somewhat analogous situation.[8] But it is highly unlikely that the present "liberal" Court will overrule the judgment of Congress unless it is obviously outrageous. There seems to be nothing even remotely unreasonable about a statute which will authorize the States to tax interstate sales. To a certain extent this will discourage such sales. But it does not discriminate against them. This is not a discrimination against interstate commerce. It merely removes a discrimination against intrastate commerce. Interstate sales are treated no worse than local transactions. They are simply put on an equal footing.

The other factor which seems decisive in this connection is the consistent deference of the Supreme Court to the judgment of Congress upon questions of national interest in cases of this complexion. The state prohibition cases are one of a multitude of instances where Congress has authorized state action upon matters where state legislation would

[8]See Southern Pacific Co. v. Jensen, 244 U. S. 205 (1917); Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (1920); Washington v. Dawson & Co., 264 U. S. 219 (1924).

have been incompetent without Congressional sanction. Professor J. A. C. Grant in a recent article in the Columbia Law Review[9] points out that these statutes have been held uniformly constitutional. It is possible that the action of Congress might be invalidated by the Supreme Court in a case where it was manifestly unreasonable. This is not our problem. It is highly unlikely that the Court will depart from the established judicial deference to the judgment of Congress in matters of national interest, where the subject involved is nothing more serious than a non-discriminatory state tax on interstate sales.

The restrictions in the Federal Constitution upon a federal tax upon exports from any state and upon a state tax upon imports and exports[10] are not important in this connection in view of the apparently settled doctrine that imports and exports are limited to foreign commerce.[11] A line of decision which might possibly give some difficulty are the admiralty cases which have held that an uniform maritime law cannot be varied by state legislation, even with the consent of Congress.[12] This is a problem which is both too large and too technical for our present discussion, but I should like to point out to any of you who may be familiar with the admiralty decisions that they should not constitute a serious objection. The admiralty cases represent a rather unique phenomenon in constitutional jurisprudence. They were distinguished successfully in the state liquor cases. The Court should have no difficulty distinguishing them again in a commerce case.

There is no genuine obstacle to a federal statute authorizing state taxation of interstate sales from the viewpoint of the commerce clause. However, there is a jurisdictional difficulty here which should not be minimized. A recent Supreme Court decision raises a related problem.

In *Standard Oil Co.* v. *California*[13] the State of California sought to exact a license tax of three cents a gallon on gasoline which was sold to a post exchange on an Army post. The gasoline was carried in trucks to the post and sold there to the post exchange. The state Supreme Court upheld the tax upon the theory that a post exchange was not an instrumentality of the Federal Government. The Supreme Court of the United States reversed the decision of the state court upon the ground that the Army post was under the exclusive jurisdiction of the Federal Government and the state could not tax a sale consummated there. There was a jurisdictional if not a geographic extraterritoriality which was fatal

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[9]34 COL. L. REV. 995 (1934).
[10]Art. I., secs. 9 and 10.
[11]Woodruff v. Parham, 8 Wall. 123 (U. S. 1868); Pittsburgh Coal Co. v. Louisiana, 156 U. S. 590 (1895).
[12]*Supra,* note 8.
[13]54 Sup. Ct. 381 (1934).

to the constitutionality of the tax. It would seem to follow that if the sale had been made in another state California could not have taxed it. Consider the bearing of this decision upon our present problem.

It is axiomatic that a state cannot tax property, persons or transactions beyond its jurisdiction. The attempt to do so has repeatedly been held to be a deprivation of due process of law within the terms of the Fourteenth Amendment. Conceding that the Federal legislature may authorize a tax on interstate sales as far as the prohibition against state regulation of interstate commerce is concerned, may Congress constitutionally fix the situs of such transactions within the buyer's state? There is no direct authority on this point. Collateral authorities are vague and conflicting. There are, however, a few basic postulates which may probably be assumed.

It would appear to be obvious that if the situs of a sale is fixed in one state, Congress could not authorize a state which has no jurisdiction over the transaction to tax it, even though it was related to interstate commerce. Congress may be able to waive the immunities of the Commerce Clause, but it cannot dispense the guaranties of the Fourteenth Amendment.

On the other hand it is equally apparent, that a state may tax a transaction which is not completely consummated within its borders. Thus in *Graniteville Manufacturing Co.* v. *Query*[14] notes were signed by a South Carolina corporation in South Carolina and sent for discount to banks in other states. The notes did not become effective until they were received by the discounting banks, but the Supreme Court held that the tax by South Carolina upon these transactions was constitutional. Although they were not completely consummated in South Carolina, sufficient had transpired there to give that state jurisdiction to tax. The same point is demonstrated by the rather confusing line of cases on jurisdiction to tax insurance contracts.[15] Although it is hard to thread a consistent doctrine through these decisions, they make it manifest that a state may tax a transaction, even though in its entirety it did not occur within the taxing state. On the other hand the transaction must sustain some reasonable relation to the taxing state, or it will fail for extra-territoriality.

In connection with interstate sales, the following assumptions may be valid, although in the absence of explicit affirmation from the Supreme Court we must bear in mind that they are only assumptions. A state

[14]283 U. S. 376 (1931).

[15]Allgeyer v. Louisiana, 165 U. S. 578 (1897); St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346 (1922); Equitable Life Insurance Co. v. Pennsylvania, 238 U. S. 143 (1915); Palmetto Insurance Co. v. Connecticut, 272 U. S. 295 (1926); Compania de Tobacos v. Collector, 275 U. S. 78 (1927).

may have jurisdiction to tax an interstate sale even though title did not pass within the taxing state and the entire transaction was not consummated there. Phrasing this more concretely, if there is an interstate sale and title to the commodities passed when they were started in transit in the seller's state, this will not necessarily negative a tax by the buyer's state if some pertinent element of the contract was negotiated in the buyer's state. Thus, if the order for the goods was sent from the buyer's state, or was solicited or booked there, or if the contract of sale was made there, this should authorize a tax by the buyer's state upon the contract of sale, if not upon the sale itself. With this in mind, if we revert to our proposed statute[16] we shall find the concluding sentence reading as follows: "For the purposes of this Act a sale of tangible personal property, transported, or to be transported, in interstate commerce shall be considered as made within the state into which such property is to be transported for use or consumption therein, whenever such sale is made, solicited, or negotiated in whole or in part within that State." The effect of the statute is to sanction a tax by the buyer's state, where the sale or some essential part of the negotiations leading up to the sale took place in the buyer's state. This would appear to be constitutional. But it is constitutional, not because Congress can fix the situs of the transaction where it chooses, simply because the commodities which are the subject of the sale pass in interstate commerce, but because there is a sufficient jurisdictional basis for the tax apart from any Congressional action.

The statute, then, seems to be constitutional. It does not conflict with the Commerce Clause, and it contains self-imposed jurisdictional limitations which should escape any conflict with the Fourteenth Amendment. But does it close the door to evasion or avoidance of state sales taxation?

Assume that a sale is entirely consummated without the taxing state, but the goods are later transported there, can this transaction be taxed? North Carolina has a sales tax. Virginia, her neighbor to the North, lacks such legislation. If a citizen of North Carolina crosses the state line into Virginia and purchases commodities there, it is difficult to see how North Carolina can tax this transaction, even though the goods are shipped or brought back into the state. Although the proposed federal statute discourages people in a sales tax state from ordering goods outside the state, it does not deter them from crossing state lines and buying goods outside the state, or perhaps, purchasing goods outside the state through an agent; although, if a buyer within the taxing state instructs his agent outside the state to purchase goods, the instruction might be

[16] *Supra*, note 3.

some jurisdictional basis on which to posit a tax. At any rate, even Federal assistance still leaves a margin of non-taxable transactions which may successfully avoid a state sales tax.

The only method of reaching these transactions would appear to be by a tax on use, rather than sale. That is, a tax would be imposed on the local use of goods which were purchased outside the state for the purpose of avoiding a sales tax. The Supreme Court has sustained similar taxes on gasoline.[17] There is no apparent reason why such a tax might not be levied constitutionally upon the use of other commodities, unless there is some latent significance in the fact that gasoline is more rapidly consumed by use.

Use is a local matter, which is sufficiently severed from interstate commerce to be taxed without any enabling federal legislation. It seems to me that it might well be argued that since a complete scheme of state sales taxation should include a tax on use, measured by sales which cannot be reached otherwise, that it would simplify matters to tax all of these interstate and extra-state sales by a use tax, without resorting to Congressional assistance.

Since the sellers in these transactions are outside the taxing state, there is no effective legal method by which they can be compelled to pay the tax. This results in an administrative difficulty, in that it necessitates the collection of the tax from the consumer. The number of consumers preponderates so greatly over the number of distributors, that it is much easier to trace and liquidate a sales tax liability, if a direct legal obligation can be imposed on the seller to pay the tax, although its ultimate economic incidence is shifted to the buyer. But this is not a difficulty which is peculiar to a use tax. The same problem must be faced in connection with the collection of a tax on interstate sales. Congress may authorize the tax, but it has no constitutional power to enable the buyer's state to impose any binding legal obligation to pay the tax upon an extra-state vendor.

Mr. Perkins suggests in his article[18] that this administrative difficulty might be overcome by imposing a lower tax, if this were paid by the seller rather than the consumer. The object would be to entice the seller to voluntarily pay the tax, in order to avert the possibility of a larger tax by the buyer. Thus if a North Carolinian purchased commodities from a Virginian in Virginia, the seller might voluntarily pay a three per cent tax to North Carolina to prevent that state from exacting a four per cent tax from the buyer. The success of this plan would seem to some extent

[17]Bowman v. Continental Oil Co., 256 U. S. 642 (1921); Hart Refineries v. Harmon, 278 U. S. 499 (1929); Gregg Dyeing Co. v. Query, 286 U. S. 472 (1932).

[18]E. M. Perkins, *op. cit. Supra,* note 2 at pp. 106, 107.

contingent upon how effectively the tax was enforced against buyers. If the chance of the buyer being compelled to pay the tax were remote, the possibility of a voluntary payment by the seller would not be very great. Effective enforcement of the tax against the buyer would seem in turn to depend upon notice to the taxing state of the sale. Whether a feasible machinery could be devised by which the states would exchange information regarding sales is a question which invites some expert reflection. Certainly, it seems to be rather optimistic to expect a non-sales tax state to compel its distributors to report all interstate sales.

The plan for a differential where the tax is paid by the distributor and the consumer does not, however, seem to present any insuperable constitutional difficulties. A faint suggestion that this involves a discrimination against interstate commerce could be forestalled by a provision for a like differential in connection with the local sales tax. To prevent evasion of the local tax by buyers who might take advantage of the option of paying the higher tax directly to the state, to escape the tax, entirely, the local merchant could be charged at peril with an accurate record of the names and addresses of the buyers who assumed the direct payment of the tax.

To conclude our discussion let me sum up as briefly as possible:

The existing immunity of interstate sales from state sales taxation strikes not only at the state treasury. It is a constant incentive for interstate buying at the expense of local business.

A federal statue which will strip this immunity from interstate sales and permit a tax by the buyer's state is probably constitutional. It is not an unconstitutional delegation to the states of an exclusive Congressional power over interstate commerce. Moreover, there is probably a sufficient jurisdictional basis for the tax where the sale, or some substantial element in the negotiations leading up to the sale, occurs in the taxing state.

There is, however, an apparent administrative difficulty in collecting the tax from these interstate sales in the buyer's state. Since there are numerically more buyers than there are sellers, it is easier to liquidate the liability for a sales tax, if the tax can be collected from the seller. In an interstate sale the buyer's state will normally lack jurisdiction to impose any direct legal obligation on the seller to pay the tax. A substantial differential in the rate of tax when it is paid by the distributor and when it is paid by the consumer might tend to entice the seller into voluntarily contributing the tax. But I must confess that it seems to me that there is an almost insuperable difficulty in tracing these sales, so as to bring the requisite pressure on buyers to pay the tax, which will provide the needed incentive to induce the sellers to liquidate it voluntarily.

Moreover, even federal authorization to tax interstate sales leaves a margin of untaxed transactions where buyers in a sales tax state cross state lines to do their purchasing. A state sales tax, even with the enabling federal legislation, still has a tendency to drive business outside the state. The only method to meet this situation seems to be by a use tax of probable constitutionality. The difficulties in administering such a tax would appear no greater than those which will be encountered in administering a consumer's tax on interstate sales. It might simplify matters, however, if the attempt were made to reach all of these interstate and extra-state sales by a tax on local use, without recourse to a Congressional waiver of the immunity of interstate commerce.

LAW OF WASTE IN MISSISSIPPI TERRITORY AND STATE

T. C. KIMBROUGH*

In April, 1798, the Congress passed an organic act providing for the creation of the Mississippi Territory and for laws for its government.[1] In 1804 the Congress by an act added the territory north of 32° 28' latitude to the territory comprised in the organic act, and in 1813 the territory south of 31° latitude was added. The territory south of 31° latitude, and lying between the Pearl River on the west and Perdido on the east, was the territory known as West Florida.[2] Mississippi Territory at this time included what is now the states of Alabama and Mississippi. The Ordinance adopted was the same as that adopted by the Congress in January, 1797, for the government of the Northwest Territory; and the people of the Mississippi Territory were thereby given the benefit of the same form of territorial government and the same laws as the people in the Northwest Territory.

Article 2 of the Ordinance of 1798 provided that the following laws among others, should govern the inhabitants of the Territory: "The inhabitants of said Territory shall always be entitled to the benefits of the law of habeas corpus, and of the trial by jury, and judicial proceedings *according to the course of the common law.*"[3]

This Ordinance established the common law for the Territory and at the same time abolished the civil law, which was in operation under the Spanish Rule in the Territory.[4] The territorial legislature which was provided for, under the organic act, at once, by an act of the General Assembly, clothed the judges of the Circuit Courts of the Territory with full jurisdiction over all actions or suits, real, personal, or mixed, and over matters and things arising under the Constitution and Laws of the United States, provided that such jurisdiction should be exercised, "according to the principles and usages of law," and, further provided, that the courts should have the power, authority, and jurisdiction of justices of assize, nisi prius, oyer and terminer, and jail delivery.[5]

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[1]1 STAT. 549 (1798).

[2]Act of May 14, 1812, 2 STAT. 734.

[3]Laws of the U. S. vol. 1, p. 475; TOULMIN'S DIGEST 473; PETER ISLER'S COMPILATION OF TERRITORIAL LAWS, 1816.

[4]Judge Sharkey, Morgan v. Reading, 3 S. & M. 366 (1844).

[5]Act February 10, 1807, Sec. 9.

Section 17, Act of February 10, 1807, also provided that the courts may grant judgment according to "the principles and usages of law," and Section 24, Act of February 10, 1807, provided that after the rendition of a final decree the clerk may issue a writ of execution, "or any judicial process which may now issue from any court of common law . . . and it shall have the same force and effect, as if the process had been issued upon a judgment obtained at common law." Section 4, Act of February 10, 1807, provided that after the first of October, 1807, "all the laws of the governors and judges, all acts of the General Assembly of the Mississippi Territory, and of the statutes of England and Great Britain, not contained in the said volume of statutes, shall cease to have any force or validity in this territory."[6]

The purpose of the writer, at this point, is to show a definite setting aside of the civil law, which prevailed in the Territory until 1799, and the absolute commitment to the rules and principles, substantive and procedural, of the common law. It is a well known principle of international law that when a country is ceded to another that the system of laws prevailing in the ceded territory, remains the same until changed by the government to whom the territory has been ceded.[7] It has also been held by the courts of this country, where a system of laws prevails in a territory which is ceded to the United States, that, in order to abrogate the system of laws in force at the time of the cession, it is necessary to specify what system of laws will take its place. The great majority of the settlers in the Mississippi Territory were of English, Scotch and Irish descent. They were familiar with the common law; it was part and parcel of their heritage; and any other system of laws would have been hateful and displeasing to them. They were of the same stock of people who settled Virginia, the Carolinas, and Georgia. They brought with them in their migrations from the mother country, the common law; and, wherever they settled, adapted it to their needs in the new country. Often radical changes were made in the common law in order to make it fit conditions in the unsettled country.

With no available records from which to gather light, it is not readily understood what was in the mind of the General Assembly when it said ". . . that all the statutes of England and Great Britain shall cease to have any force and validity in this Territory." In an effort to determine the legislative intent, it is not unreasonable to assume, that members

[6]PETER ISLER'S COMPILATION (1816) STATUTE LAWS OF MISSISSIPPI TERRITORY; TOULMIN'S DIGEST, c. 65. Reference was had in Section 4 of TOULMIN'S DIGEST to the Laws of the Mississippi Territory.

[7]Chew v. Calvert, Walker 54 (1818): "The law of Spain continued in force here till after the territorial government was actually organized under the Act of Congress, of April 7, 1798, and this government was not actually organized until within the year 1799."

of the General Assembly had in mind that the physical, business and social conditions of the Territory were strikingly different from those obtaining in the mother country, and to attempt to make both the common and statutory law of England fit into the new conditions and materially changed environments was neither sensible nor practical. "The common law is not a code of inflexible and logically consistent rules, but a body of broad and comprehensive principles based upon reason, justice, and practical considerations, and its development determined by the social needs of the community."[8] That if the statute law of England was adopted, it would mean the construction placed upon those statutes by the English courts would accompany them and be silently adopted as an integral part of the statutes themselves.[9] The land laws of a country like England, long settled, with ancient customs, usages, and modes of living, and a radically different social system could not possibly suit the new country. Then, too, the Organic Act creating the territorial government provided that the people should be entitled to "judicial proceedings according to the course of the common law." The courts of several of the older states, together with the Supreme Court of the United States, had already held that the common law included all English statutes amendatory of the common law, and were brought by the colonists with them in their migration. To forestall any such construction by territorial courts, the General Assembly almost immediately enacted the law that no English statute should have any force or effect in the Territory. It was more practical to adopt the non-statutory common law, and then, make such changes by legislative enactment as appeared necessary, from time to time, to promote justice and the happiness of the people in their new and changed environment.

On March first, 1817, Congress passed an enabling Act, whereby the Territory could become a state. This act fixed the boundaries of the proposed new state and provided for the calling of a Convention to create and adopt a constitution. In April, 1817, the Constitutional Convention completed the work of building a constitution, which was submitted to the Congress and was almost immediately ratified by that body, thereby giving Mississippi the rights of statehood and placing her on an equal footing with the original states in all respects whatsoever.

The Supreme Court of the United States, together with several State supreme courts, has held that English statutes declaratory or amendatory of the common law, which were of a general nature, constituted a part of the common law. There are, however, some contrary opinions. Mississippi courts have held the contrary, but their holdings were in-

[8]108 Miss. 871, 67 So. 491 (1915).
[9]Ingraham v. Regan, 23 Miss. 213 (1851).

fluenced by the abrogation of the English statutes through constitutional provision. Judge Clayton, in an opinion delivered in the early days of our state supreme court,[10] in speaking of the statute of 5 Geo. II, c. 7, in regard to the sales of land, said, "We have no such statute, and *no* English statute has any intrinsic value here." Judge Clayton thus calls attention to the Mississippi Territory Organic Act, which secured to the inhabitants of the Territory the enjoyment of the Judicial proceedings according to the course of the common law.[11] This, the judge said, together with the provisions of the Constitution of 1817, Schedule, Section 5, has been construed to exclude all English statutes, and to adopt only the common law, and the statutes of our own government, for the determination of the rights of the citizens. Thus, both territory and state government, declare in no uncertain terms, and with emphasis, that the common law as it existed at the time of the organization of these governments, uninfluenced by British statutes, should be the law of the land. Our courts on numerous occasions have accordingly held that the statutes of England and Great Britain, have no validity, force, or effect in Mississippi.[12]

The discussion has now reached the point where logically a consideration of the law, as it pertains to waste in the territory and state may be had. The territorial phase of the question can be disposed of in a few lines. We have no official record of any decisions by territorial judges dealing with questions of waste, although the territorial courts were legally organized and commenced to function the latter part of 1799, and continued until 1817, the time of the organization of the state government. The judges must have delivered oral opinions, else some official record would have been preserved of them. Many old territorial court records, consisting of pleadings and the procedure in the cases, have been collected by the State Archivist, and have been neatly and carefully classified.[13] The statute law, under neither territorial nor state government, created an action of waste, except in the sole case of tenant in dower. The problem for study now is, What constituted the law of waste in the Mississippi Territory and during the early days of statehood under the Organic Act creating the territory, together with the laws passed by the General Assembly, and the constitution and state laws.

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[10]Broadman v. Catlett, 24 Miss. 144, in which he cites the opinion of Judge Sharkey in Morgan v. Reading, 3 S. & M. 366 (1844) to the same effect.

[11]TOULMINS DIGEST, 273, Laws of U. S. vol. 1, 475.

[12]Wheelock v. Cozzens, 6 H. 279 (1842); Sessions v. Reynolds, 7 S. & M. 130 (1846); Jordan v. Roach, 32 Miss. 481 (1856); Evans v. Fisher, 40 Miss. 643 (1866); Paddock v. Shields, 57 Miss. 346 (1879); Lbr. Co. v. Bd. of Sup. 89 Miss. 505 and 598, 42 So. 293 and 319 (1906).

[13]Letters, Dr. Dunbar Rowland, State Archivist. "These old cases constitute an unexplored field and should appeal to the research worker."

One might readily answer, from a study of the question in the District of Columbia and some of the older states, that the common law of waste in England, as it existed at the time, taken together with the general statute laws that were amendatory of the common law. But the problem with us presents an element of real difficulty, not found in any other state of the Union, due to the fact that our territorial General Assembly and the Constitution of 1817 made all the statute laws of England and Great Britain of no effect in the territory and state. No other territorial or state government passed any such abrogating acts. We stand alone in this respect.

In order to solve the problem, it becomes necessary to make a study of the common law of England, in a large measure apart from the amendatory statutes of a general nature.

My discussion therefore will include, first, the English common law of waste prior to the statutes of Marlbridge and Gloucester; second, the common law subsequent to these statutes; and, third, the law of waste as disclosed by our statutes and court decisions.

THE MEDIAEVAL COMMON LAW

Lord Coke, the great exponent of the common law (1620-1657), in discussing the question of waste under the common law, said that prior to the Statute of Marlbridge (1257) and the Statute of Gloucester (1268) there was no action of waste against a tenant for life or years; that is, the tenant was unimpeachable for waste; but an action for waste would lie at common law against the tenant in dower, tenant by courtesy, and guardian in chivalry.[14] In discussing the views of Lord Coke, it must be constantly borne in mind that he lived and wrote 300 years or more after the statutes of Marlbridge and Gloucester were enacted. The reason given by Lord Coke for the diversity was, that the latter tenancies were created by law, and, therefore, the law gave them a remedy, but tenants for life and years came by demise and lease of the owner of the land and he might, if he so desired, provide against the doing of waste by his lessee, and if he did not, it was his own negligence. This statement of Lord Coke is frequently embodied in both American and English judicial opinions on waste.[15] The Statute of Marlbridge, 52. Hen. III, c. 1. 23 (1267), for the first time, according to Lord Coke, created a cause of action for waste by tenants for life or years.[16] This statute

[14] 1 COKE LIT. 67, 54 A; 2 BL. COM. 282; Taylor L. T. § 686; 33 N. J. L. 286 (1869).

[15] *Ibid.* Also BEWES, WASTE, 1. 2. FITZ. NAT. BREV. 55.

[16] "Also farmers during their terms shall not make waste, sale or exile of home, woods, and men, nor of anything belonging to the tenements that they have to farm without special license had by writing of covenant, making mention that they may do it, which thing if they do and thereof be convict, they shall yield full damages and shall be punished by amerciament."

proving insufficient, further legislation was necessary, and the statute of Gloucester, 5 Edwd. I, c. 5, was passed in 1278. This statute provided for penalties and forfeitures.[17] These two statutes, according to Lord Coke, created for the first time a cause of action for waste by tenants for life and years, together with full and efficient remedies. Before the enactment of the statutes, life tenants and tenants for years were unimpeachable for waste, unless the covenant provided otherwise. If Lord Coke is correct, and there be no law of waste in case of life tenants and tenants for years, save as manifested by these two statutes, when the territorial legislature and the Constitution of 1817 abrogated all the statutes of England and Great Britain, what became of the action of waste in the case of the life tenant and the tenant for years? If we accept the view of Lord Coke, there was no action possible at common law against a tenant for life and a tenant for years, during our territorial government, and the early years of our state government, unless such an action was created by the common law subsequently to the enactment of the statutes mentioned. Lord Coke is one of the great luminaries of the common law, was its champion and defender when equity in the 17th Century was gradually extending its remedies where there were none at common law, and where it was giving adequate, full, and complete remedies where the common law remedy was defective, inadequate, and inapplicable. Fortunately, research, done within comparatively recent years, shows most abundantly that a common law of waste did exist, with efficient remedies for some time before the statutes of Marlbridge and Gloucester were enacted. The legal writers through the years since Coke's time (1620-1657) have been inclined to be critical of his theory, but have been unable to overthrow him, until comparatively recent times, for want of substantial record information.

Bracton, a most distinguised lawyer and writer, was born in 1216 and lived to 1268, the greater part of his work having been accomplished around 1240, sometime before the statutes of Marlbridge and Gloucester were adopted. Bracton's authority, cited by Reeves,[18] indicates the existence of a process involving an inquiry into alleged waste, and assessment by damages against a life tenant. Bracton makes this point very clear for us,—that waste by a tenant for life was a wrong.[19] The material to which Bracton had access is now made available to the profession by

[17]"That a man henceforth shall have a writ of waste in the Chancery against him that holdeth by law of England, or otherwise, for term of life or years, or a woman in dower, and he which shall be attainted of waste shall lease the thing he has wasted, and, moreover shall recompense thrice so much as the waste shall be taxed at." 1 CHIT. ST. PT. 2, 1106.

[18]1 HIST. ENG. LAW 386.

[19]BRACTON, f. 169, 217; BRITT 113 B. See Laceby v. Malet (1203) 2 Sel. Civil Pleas 144.

the untiring and highly important work accomplished by Vinogradoff, Maitland, and Professor Holdsworth. Bracton's Note Book covers the period from 1217 to 1240. It embraces cases having to do with all phases of the common law, and serves as a fine cross section of the common law in the courts of England for a period of a quarter of a century. Bracton's Note Book, covering this period of time, reveals to us at least five cases concerning life tenants and tenants for years, and waste.[20] One might be inclined to be critical because only five cases are brought to light during this time involving life tenants and tenants for years, but Bracton's Note Book gives us at least twenty other cases of waste, involving tenants in dower, by courtesy, or guardian. If we examine the reported cases of this nature in the Mississippi decisions from 1817 to 1840, no such number will be found. In fact, hardly so large a number of cases will be found in the Mississippi reports from the earliest times of the state to 1934. It is not so much a question of the number of cases which have been edited, but the clearness and accuracy with which they disclose waste on the part of the life tenant and tenant for years, together with a remedy therefor. Take the case of *Peter Pejure*,[21] who was adjudged to answer Nicholas Cresesquer for waste. It appeared in this case that the waste was of a very small value and the case therefore dismissed, but a prohibition was issued forbidding the defendant to commit any further waste. This was a clear cut case of waste, together with the procedure in such cases. The *Matilda de Gatesdena Case*,[22] gives even a better illustration of a case of waste of a tenant for life, and the procedure. The defendant was attached for commiting waste. An inquest was directed, which found and reported waste, whereupon Matilda was adjudged to be in mercy and to pay Renolf, plaintiff, the amount of waste found. She was required to give pledges that she would commit no more waste. It would be difficult to imagine a more enlightening and convincing case on the question. The other three cases are clearly as convincing of the fact that the life tenant and tenant for years could be and were held for waste under the common law prior to the statutes of Marlbridge and Gloucester. One can safely conclude there is now but scarce ground for the decision of some English writers that "it seems probable that in the past a tenant for life has been free to use and abuse the tenement as pleased him best."[23]

Bracton was the great legal writer and thinker of the mediaeval period, of the common law. His writing profoundly influenced the legal writers of the 13th century, and later, in the 16th and 17th centuries,

[20]Bracton's Note Book, 443, 550, 607, 691, 718 & 1304, 1371.
[21]Bracton's N. B. 607.
[22]*Ibid*, 443, 550.
[23]2 Pollock & Maitland 9.

when there arose a renewed interest in his writings, his influence was again pronouncd.[24] During the days of Bracton, and just prior to the adoption of the statutes of Marlbridge and Gloucester, there was a most vigorous growth of the English law, due to the fact that the minds of English lawyers had become steeped in a knowledge of legal processes gleaned from their training in civil and common law.[25] It was during these days that the adjective side of the common law attained its greatest importance from the standpoint of elasticity and flexibility, which made it effective and efficient in affording remedies for causes of action of every kind. The maxim, Ubi jus, ibi remedium, during this time fully and abundantly came into its own.[26] These courts did not by any means confine themselves to the remedy of damages alone, but they would give numerous kinds of specific relief, which later came to be a part of the equitable jurisdiction of the Chancellor. This manner of relief was not confined to contracts, but obtained in cases of injury to property, such as waste.[27] The courts at this time freely made use of the writ of prohibition.[28] This writ performed a function analogous to that done by both interlocutory and perpetual injunctions of modern law. The lessee for life or years, dowress, and guardian could be and were prohibited from committing waste by exercise of this writ.[29]

A writ of estrepement could also be called into use to prevent the commission of waste after a judgment in a real action. The writ subsequently by statute of Gloucester was extended to prevent the commission of waste pending the proceedings in an action. It appears from the cases given by Bracton that the writ of prohibition could either be addressed to the sheriff or the parties themselves. A clear analogy is here established to the equitable injunction.[30]

In the cases given, the relief was not based on the present ground of inequitable conduct of defendant, but was placed squarely on the ground that it was a *wrong,* if the land, or an interest in the land, was used in a manner contrary to the original intention of the parties. From the foregoing it will be seen that during the 13th century, prior to the statutes of Marlbridge and Gloucester, the mediaeval common law flourished and became a most highly developed system of laws. This mediaeval common law recognized and enforced in a most satisfactory way by appropriate machinery the action of waste in cases of the dowress,

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[24]2 HOLDWORTH'S *op. cit.,* 244-290.
[25]*Ibid,* vol. III, 287.
[26]*Ibid,* 244.
[27]HAZELTINE, ESSAYS IN LEGAL HISTORY (1913) 269-284; BRACTON'S N. B. case, 1075.
[28]HAZELTINE, *op. cit.,* 270-284.
[29]BRACTON'S N. B. cases 461, 527, 540, 388, 443, 1075, 1165.
[30]HAZELTINE, *op. cit.,* 275.

the guardian in chivalry, and the lessee for life and for years. These views are borne out by Reeves in his *History of the English Law.*[31]

Professor Holdsworth, in his recent great work on the *History of the English Common Law,* makes it clear that the action, together with the remedy for waste, existed against the tenant in dower, the guardian, and the tenant for life and years before the enactment of the foregoing statute.[32]

Bracton's Note Book, as heretofore pointed out, gives to us cases of waste in accordance with, and bearing out, the statements in this regard by Reeves and Holdsworth.

Chancellor Kent, as great a name as Coke, and the greatest authority upon American common law, criticises Coke's view and approves the contrary.[33] Professor George W. Kirchway of Columbia University, in a learned article,[34] giving evidence of considerable research work on the subject of Liability of Waste, speaking of Lord Coke's view, that prior to the statutes of Marlbridge and Gloucester there was no common law action of waste against a tenant for life or years, says: "It requires a greater measure of confidence to declare that Coke was wrong in his opinion, but the evidence to that effect, though slight in quantity, is *conclusive.*" Smith, an English law writer of note and worth in his work on *Landlord and Tenant,* criticises Coke's theory.

My conclusion, from a study of these writers is: First, Lord Coke was wrong when he stated that no cause of action existed for waste in the case of tenants for life and years prior to the statutes of Marlbridge and Gloucester. Holdsworth, Reeves, Kent, and Kirchway clearly contradict him on this point. The array of authority against him is overwhelming. I might also call attention here to Crabb, a distinguished writer on the History of English Law, who says in his work, that Lord Coke "supposes" there was no action of waste.[35] Second, that a cause of action for waste in the cases mentioned was created, together with the remedy, by the mediaeval common law sometime prior to the statutes of Marlbridge and Gloucester. Third, that these statutes created no new cause of action, but simply served to make the "remedy more specific and

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[31]Vol. II 438, ". . . for we have before shown, upon the authority of Bracton that a proceeding might be had for waste against a tenant in dower, and a tenant for life, and a guardian," and in Note 1, he says, "Lord Coke holds the contrary, but gives no authority for his opinion."

[32]HOLDWORTH'S, HISTORY OF ENGLISH LAW, vol. II, 236-252, 349, vol. III, 121-125. On page 248, ". . . thus the dowress, the guardian, and lessee for life or years could be prohibited from committing waste." p. 349,—"In Bracton's day interests for life were well known . . . and decided cases upon the subject of waste were shown fixing the nature of the interest of the tenant for life."

[33]4 KENT'S COMMENTARIES, 1 star page 80.

[34]8 COLUMBIA LAW REVIEW, 427, 630.

[35]CRABB'S HISTORY OF ENGLISH LAW, 158.

certain," as stated by Reeves. Holdsworth says the statutes are "supplementary," that they laid down a general rule and gave a new remedy.[36]

If you take the statutes in their entirety, it is inescapable that their nature is highly procedural and remedial, their purpose clearly being to give a more effective remedy.

The substantive action of waste thus created by the mediaeval common law has continued an interrupted existence, except as to guardian in chivalry, which was abolished, through all the subsequent years of English judicial history down to colonial times, and was brought to this country in the migrations of our ancestors. It is true changes have taken place from time to time, by statute and otherwise, in the procedural law of waste, the remedy, but as to the original common law substantive action of waste itself, no changes have taken place.

The action itself has never been dependent for its existence on an English statute. It was the creature and product of the common law, into whose fertile soil it struck deep its roots, and needed no statute to give it vitality and life. If the statutes of Marlbridge and Gloucester had been at any time repealed by Parliament it would not have destroyed the substantive action of waste. It would have automatically continued to exist as the common law. As a matter of fact, the British Parliament in 1879 repealed the statute of Gloucester, but this in no way interfered with the action of waste in the cases of life tenants and tenants for years. The American cases uniformly hold, and such is the English rule, that the repeal of a statute that is either amendatory or declaratory of the common law does not destroy the original common law rule. In fact many cases hold, if a statute is only amendatory or declaratory of the common law, the litigants may elect as to whether they will proceed under the common law, or the statute,—and the rule applies as well to the cause of action as to the remedy. It is ipso facto revived, and necessarily becomes operative as the law on the repeal of the statute.[37] The foregoing rule of law being established by staunch and impregnable authority, may we not confidently conclude at this juncture that although the Territorial Laws and the State Constitution abrogated the English statutes concerning waste, there still existed after the abrogation the common law action of waste, created, adopted, and used by the courts of England prior to the statute laws on the subject?

But, further it is urged by some writers and courts that the ancient statutes of Marlbridge and Gloucester gradually, through the centuries,

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[36]3 HOLDSWORTH 121.

[37]Sutton v. Mandeville, 23f. Cas., 13650 , 1 Cranch CC 115; Chadburn, 9 Allen (Mass) 173 (1864); Wolcott v. Shubert, 217 N. Y. 212, 111 N. E. 829 (1916); Y. & M. V. R. R. v. Scott, 108 Miss. 871, 67 So. 491 (1915).

were merged into and became themselves the common law, so much so, that their force, effect and indentity as statutory laws was lost, and they were taken and regarded as a part and parcel of the common law of England. Therefore the abrogation of the English Statutes by our Territorial Legislature and the Constitution of 1817, did not reach or apply to these statutes.

The Parliament did not take this view of the question, for in 1879 it was thought necessary to repeal the statute of Gloucester outright in order to escape the force of it, *as a statute,* upon English law. Several of the states, notably New York, thought it necessary to re-enact these statutes in order to get the benefit of them. Manifestly these states did not look upon them as having been transformed into common law. However this may be, the Mississippi Supreme Court, in construing the effect of the Mississippi Territorial legislation abrogating the English statutes, speaking through Judge Turner,[38] at an early date, held that the statutes of Marlbridge and Gloucester, after the Territorial legislation, never had any force or validity in the state. There are numerous other Mississippi decisions to the same effect.

THE LAW OF WASTE IN ENGLAND SUBSEQUENT TO THE STATUTES OF MARLBRIDGE AND GLOUCESTER

In an effort to reach a satisfactory conclusion, as to the law of waste in our territorial days and early statehood, it now becomes necessary to give some study to the law of waste subsequent to the adoption of the statutes of Marlbridge and Gloucester. This study will have to do first, with remedies entirely new, having their origin in the equity courts, because of the defects in the statute and common law, and, second, changes in the common law, superinduced, no doubt, by the remedies afforded by equity.[39] We can secure but little light on the question during the 14th and 15th centuries. During these years it is fair to assume the law of waste remained, with some few changes, not necessary to discuss, substantially the same as it was in the 13th century. But during the 16th century we find petitions or bills being filed in equity to restrain waste. True, the cases are not numerous, but the cases in no uncertain way establish the fact of an equity jurisdiction.[40] In *Roswell's Case* (1619)[41] it was laid down that equity would always enjoin waste, and this jurisdiction was recognized in 1677 in the case of *Skelton* v. *Skelton.*[42] The

[38]Wheelock v. Cozzens, 6 H. 279 (1842).
[39]3 HOLDSWORTH, *op. cit.,* 121-4.
[40]MOORE 554, PLACITUM 748; CHAFEE, CASES ON EQUITY RELIEF AGAINST TORTS. See comments in 2 COKE INST. 307; 3 BL. COM. 225.
[41]1 Rolls Abr. 377; Farrant v. Lovel, 3 Atk. 723.
[42]2 Swanst. 170n. 171, 172.

first decision coming from an American Equity Court,—that is, that the writer has been able to locate, is *Smith* v. *Poyas,* 2 Des. Eq. S. C. 156. This case first came before the court in 1788 and was finally decided in 1801. The judges, Rutledge and Marshall, held without any question that the jurisdiction was in equity to restrain waste by life tenants and to require an accounting. There are other American decisions to the same effect prior to 1817. It is fair to assume the Mississippi courts, territorial and state, were familiar with these decisions.

Having shown the equity jurisdiction, it is unnecessary to prolong the discussion by going into the cases which might be cited in detail. The jurisdiction having once been securely established, it had become, before 1817, a matter of course in England before and during the days of the emigration.[43]

Due, no doubt, as already stated, to the influence and activity of equity in affording relief against the defects and harshness of the statutory, and common law of waste as early as the 16th century, the common law courts began to remedy the defects in the common law of waste by allowing actions on the case in the nature of waste.

The courts at first were not favorably inclined to this action, but though long opposed,[44] in the course of time, it came to be used in every case of injustice not remedied by any other process.[45] Its distinguishing characteristic would seem to be that all the facts upon which plaintiff relies are to be stated in his declaration.[46]

In remote times, when actions were carefully classified, a mistake in the name of the action was generally fatal to the case. A form of remedy was devised to cover new wrongs as they might occur to prevent a failure of justice. This was called an "action on the case,"[47] which was employed where the right to sue resulted from the peculiar circumstances of the case, and for which other forms of action gave no remedy. The writ in this case, as its name imports, was invented for the express purpose of giving a remedy where none of the common law forms of writ were applicable. It was in fulfillment of the maxim, Ubi jus ibi remedium, and as has already been stated, its creation was no doubt influenced by the remedies being given by equity in like cases.[48]

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[43]Jeremy v. Lowager (1596) (Cro.-Eliz. 461) and ft. notes p. 777, (1600).

[44]22 Viners Abridgement 523, PLACITUM, 11; 2 BROWN CHAN. CASES, 74; Whitfield v. Bewit, 2 P. Wms., 240; AMES 460; Mollineux v. Powell, 3 Peere Williams, 268n (F); Lutterell's Case, (precedents in Chan. 50).

[45]Corrall v. Green, 93 U. S. 509; 23 L. ed. 738 (1875).

[46]Hathorn v. Calif. 53 Me. 471.

[47]1CHIT. PL. (16 Am. Dec.) 138, 139; 3 BL. COM. 123; 4 ROBISON'S PR. 761; TIDD'S PR. 870.

[48]2 REEVE'S, HISTORY OF ENGLISH LAW 394, 507, 608; 4 STANDARD ENC. OF PROC. 613.

It should be made clear that no new substantive action of waste was here created by the common law. The substantive action grew out of, and is rooted in the wrong or injury done to the inheritance, by the tenant.

This substantive action existed before the statutes of Marlbridge and Gloucester, and was restated by these statutes, and is now dressed up in another form, which is called an action on the case. We must be careful not to confuse cause of action and remedy. They are separate and independent matters. The remedy here changed, the *form* of the action changed, but not the substantive cause of action itself.

Professor Kirchwey, well says,[49] "the influence exercised by forms of procedure in shaping and determining substantive rights is a commonplace of jurisprudence. No better illustration of it can be found than in the instance before us. The new action starts with a clean slate." "What is waste, and what not" must still "be determined by the common law," "but the statute of Gloucester is relegated to the dust heap of the law, along with the remedy created by it."

In the case of *Jefferson* v. *Jefferson,*[50] it secured the support of two judges, Pemberton, C. J. and Levintz, J., who held that, ". . . he in reversion might waive his action of waste at this time, and take his remedy by action upon the case.[51] The holding of these two judges has prevailed. The old action of waste fell into disuse long before the emigration, and was abolished by act of Parliament in 1833.[52] The new action of waste was of common law origin. It was in no sense a creature of statute.[53] These two remedies, the one in equity, the other at common law, prevailed side by side in England and the United States at the time Congress passed the Organic Act in 1798, creating the Mississippi Territory and a form of government therefor.

From the foregoing discussion, the following conclusions as to the law of waste in our territorial days and the early years of the state's history are reached.

1. That the civil law was operative in the region which afterwards became the Mississippi Territory and continued operative for at least one year after the Organic Act of Congress of April 7, 1798, creating the Mississippi Territory and a system of government therefor had been enacted. It is unnecessary for the purpose of this paper to enter into any discussion of the civil law of waste.

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[49]8 Col. Law Rev. 630.
[50]3 Lev. 127.
[51]2 Wms. Saunders, 252, and note to Green v. Cole.
[52]3 & 4. Wm. IV. c. 27 § 36.
[53]Hathorn v. Calif. 53 Me. 471; Webbs Case, 8 Coke 45b. 1; Bl. Com. 123.

2. The Act of Congress of April 7, 1798, entitled the inhabitants of the territory to "judicial proceedings according to the course of the common law," this gave to them the law of waste as it existed at the time in England, including, according to authority, the statutes of Marlbridge and Gloucester, but in a modified form suitable to the conditions existing in the territory and form of government established.[54]

3. The Act of the General Assembly of February 10, 1807, making all statute laws of England and Great Britain without "force or validity in this territory," annulled and abrogated the statutes of Marlbridge and Gloucester in the Mississippi Territory and left as the law of waste the original mediaeval substantive common law action of waste, together with the common law remedy of action on the case,[55] which had superseded the mediaeval common law and statutory remedies. The inhabitants of the territory were also entitled to the benefit of the equitable remedy of injunction and account.[56]

4. Upon the adoption and ratification of the Constitution of 1817 the people of the new state, by virtue of Section 5 of the schedule of the Constitution became possessed of the same laws of waste as existed in the territory after the passage of the Act of February 10, 1807, except for any modifications necessitated by changes in form of government.[57]

STATUTORY LAWS OF WASTE

We may now very properly turn to the law of waste as it existed by the statute laws of the state and the decisions of our courts. The subject of the statute laws will be discussed first. No specific statute is found enacted during the eighteen years of our territorial government which deals with the subject of waste, nor is there any certainty as to whether any cases came before the territorial courts for decision concerning waste during these years; although some few decisions of the territorial judges, dealing with other subjects, have been found in old law publications.[58] And perhaps the files of newspapers published at the time might disclose some important decisions.

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[54]U. S. v. Worrall, 2 Dallas 384 (1798); Patterson v. Winn, 5 Peters 241, (1831); 1 Baldwin 559; 4 Kent 79-81; Sackett v. Sackett, 8 Pick. (Mass.) 310 (1827); Moore v. Townshend, 33 N. J. L. 284 (1869); Lbr. Co. v. Bd of Sup. of Harrison Co. 89 Miss. 448, 42 So. 290 (1906).

[55]Jordan v. Roach, 32 Miss. 482 (1856) in which the court says, "The statute of Marlbridge is not a part of the jurisprudence of Mississippi."

[56]See authorities under 54.

[57]Lbr. Co. v. Bd. of Sup. of Harrison Co. 89 Miss. 448, 42 So. 290 (1906).

[58]For example, the opinion of Judge Toulmin of Mississippi Territory in the case of U. S. v. Schooner Active & Cargo (1814) is to be found in HALL'S AMERICAN LAW JOURNAL, vol. V, 543-558. Another opinion of this judge, in the case of U. S. v. The Schooner Maria (1812) is printed in NILES WEEKLY REGISTER, vol. 3, 181-183.

The legislative acts concerning waste found in our Codes are of two types. The first type of statute affirmatively creates a liability for waste, but gives no remedy; the second type simply prohibits waste in certain cases. The two types of statute will be discussed in this order.

In 1822 the legislature passed an act[59] making the widow liable for waste, but providing no remedy. The ordinary and usual construction of such statutes is, that if it merely imposes a liability, without any remedial provision, an action on the case will lie, appropriate to the character of the remedy.[60] The widow, as we have seen, was liable under the common law, which made the statute really unnecessary. But from the contents of the statute the legislature must have intended by this act to enlarge the common law remedies in cases of this kind. The Act not only makes provision for liability at the suit of the heir or devisee, but by his or her guardian, and if the widow married again, under the statute, the second husband is made liable for any waste committed by her before marriage, or by him afterwards. This act remained the law, with slight modifications, until the Code of 1880, when dower was abolished.[61] It was not necessary for the act to provide a remedy as the common law action on the case was available, attended with the imposition of ordinary damages only, and not possessory in its character. The remedy in this action was more or less like the bill in equity, being coextensive with the liability and founded on the plaintiff's right to recovery. Action on the case in Mississippi comprehends only actions ex delicto.[62] In fact, under Mississippi law almost any wrong of a civil nature may be redressed by an action on the case.[63] There are no reported decisions concerning waste committed by the widow.

The second type of statutory acts concerning waste which are merely prohibitory will now be considered. It is difficult to understand what was in the legislative mind in creating these two different types of statutes instead of simply creating a positive liability in each and every case. The prohibitory statute recognizes a wrong and prohibits it, but does not affirmatively state that liability exists. But it is in general true that negative terms in a statute show a legislative intent to make the provisions imperative, requiring a strict performance, and, since the wrong prohibited was unlawful and actionable under common law, it is possible the legislature may have had in mind making the statute mandatory and imperative. Among the early prohibitory statutes we find one prohibiting

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[59]POINDEXTER'S CODE, c. 9, § 49.
[60]Mount v. Hunt, 58 Ill. 246 (1871), citing numerous cases.
[61]CODE 1880, § 1170.
[62]Fletcher v. Benbrook, 5 S. & M. 619 (1846), citing 1 CHITTY PL. 132, 140. The Smith Case, Walker 172 (1824), distinguishes trespass and waste.
[63]Washington v. Soria, 19 So. 485. (1896). (Not officially reported.)

the guardian from committing waste on the lands of his ward. He is permitted under the statute, and authorized, to cut timber, if necessary, for the maintenance of his ward. This must be done, however, by order of the court, and it is made incumbent upon him to account for all timber cut. The prohibition in the statute seemingly covers both voluntary and permissive waste.[64] This act, with some few changes, appears in all of our codes down to and including the Code of 1930.

The acts of 1818 and 1824 contain a special prohibition against the tenant's committing waste on Sixteenth Section School Lands. The act of 1833, makes a provision for 99-year leases of these lands, which, under the prior acts of the legislature could only be leased for a term of 3 and 5 years respectively. This act is amendatory of the act of 1824 and did not in any sense repeal that act. The paramount purpose of the legislature in amending the act of 1833, must have been to change the lease term. The acts of 1818 and 1824 merely declare the common law rule, and their ommission from subsequent acts does not affect the tenant's liability. The act of 1833 leaves out the prohibition against the committing of waste by the tenant, and all succeeding laws are silent on the subject, until the publication of Hemingway's Code, when it reappears in a materially changed form. It prohibits waste by the lessee and fixes the lease period at 3 or 5 years,[65] depending on the nature of the land. Under this law lessees of the Sixteenth Section School Lands may clear such portions of the leased premises and cultivate them, as a prudent owner in fee would clear for that purpose. But sufficient wood must be left for the permanent use and enjoyment of the inheritance. The tenant, however, has the burden of showing good faith, and good faith is a question for the jury. Having established his good faith, it is for the jury to say to what extent he can cut timber before he is guilty of waste. The tenant cannot excuse the waste by claiming the timber was cut for agricultural purposes. This, in any case, would be a question of fact for the jury.

The Constitution of 1817, Section 20, made provision that the legislature should enact all the necessary laws necessary to protect the thirty-six sections of Seminary Lands which had been granted to the state by the United States Government for the purpose of maintaining a Seminary of learning.[66] The legislature immediately passed an act prohibiting the committing of waste by the tenant on the Seminary Lands, and also made a provision that no more than twenty-five acres of each quarter section should be cleared for agricultural purposes.[67] The same act re-appeared in

[64]POINDEXTER'S CODE, (1824), c. 9, § 130.
[65]See MISS. CODE ANN., 1930. § 6759-62; CODE 1906, § 1378, 4695, 4716, 4803, 4986.
[66]HUTCHINSON'S CODE (1848), 227, Art. 30.
[67]POINDEXTER'S CODE (1824), § 24.

subsequent codes, but finally the legislature failed to re-enact it, and today there is no statute prohibiting waste on these lands by the tenant, but a simple provision in the acts of 1932 that the Board of Trustees of the Higher Institutions of Learning shall protect these lands from injury.[68]

The statute law now very wisely prohibits waste on lands forfeited to the state for non-payment of taxes. It expressly forbids the cutting of timber, the extracting of minerals, rock, stone, or gravel.[69] A penalty of $5. per acre is provided. This law was the inevitable result of a large acreage of land in every county in the state being forfeited by the owners to the state for non-payment of taxes. Many acres of these lands are valuable only for the timber, stone, or gravel; so that the taking of any one of these from the lands would result not only in a substantial injury to the inheritance, but a positive, permanent injury and destruction of the value of the land. The owner however, may cut and use the wood for fuel, fences, and for the making of all necessary repairs on the farm, but not for sale.

By the statute, our courts have power, where land is involved in litigation, and it is made to appear to be necessary, to make an order which will protect the premises from waste pending the litigation.[70] This statute serves a most useful purpose, though seldom resorted to. Any waste committed after the order of the court would subject the offender, not only to an action for waste, but for contempt of court, and he would be subject to a fine therefor.

RESTRAINING WASTE BY INJUNCTION

It has already been pointed out that at the time the state first was admitted into the Union it had become customary in England and in the United States as well, where the tenant was guilty of committing waste, to enjoin him from committing further waste, and to require an accounting for all waste already committed. The law of the Mississippi cases is to the effect that whenever, under the terms of the lease, a lessee for life or for years is restricted to the use of the demised premises in a particular manner, or for a specified purpose, a violation of the covenant by the use of the premises in a different manner, or for another purpose, affords grounds for the interposition of equity by injunction to restrain waste, since the term "waste" embraces improper use of the leased premises. It has further been stated, that this no doubt was the law during the territorial days of our state government, except for the period during

[68]General Laws of Miss. 1932, Chap. 131, p. 391; Chap. 198, p. 450.
[69]General Laws of Miss. 1934, amending CODE 1930, Sec. 3256.
[70]MISS. CODE ANN. 1930, § 602.

which the civil law prevailed in the territory. The first case of waste arising where it was sought to apply this remedy was in 1821.[71] The court held that the injunction to restrain waste, generally speaking, would be granted at the instance of any person interested in the remainder or reversion.[72] The facts in the case disclose that the title to the land against which waste was threatened was in dispute between the complainant and defendant. The court, after hearing the case, announced the rule, that a court of equity will not issue an injunction to stay waste where the remedy at law is adequate, having reference to a case where the issue was a disputed title. But under the circumstances, the court held, where it is clearly shown that irreparable injury will be sustained if the injunction is not granted, the court will grant the relief. It was made clear by the court that with the defendant in possession under claim of adverse title, as a rule, this presented no ground for injunctive relief. Judge Powhattan Ellis, who decided the case, stated that the adjudicated cases in England and America were all against the granting of the writ of injunction in cases where the facts were similar to those before the court. The court quoted Lord Eldon as saying in *Pittsworth* v. *Heapton,* 6 Vesey, that he had no recollection of the Chancery Court's granting an injunction against waste under such circumstances. That it was well understood if the complainant asked for an accounting and injunction in a case of waste where the defendant was in possession under the claim of adverse title, he stated himself out of court. The same rule was laid down in *Storm* v. *Mann,* 4 Johnson's Chancery Reports (N. Y.) 21. "Then," said the court, "in such cases, the Chancellor will not interfere, unless this remedy should prove inadequate to afford relief. If it does, the court of equity will require an account to be taken." The *Poindexter* case was followed by another in 1829,[73] where the defendant was in possession under an adverse claim of title. The issues in the case were purely of a legal nature. The court again announced it would not grant the injunction to stay waste unless the remedy at law was not clear, certain, or adequate, and the threatened waste would create irreparable injury. The sum total of these two cases is, first, a recognition of the rule that an injunction will be granted to stay waste, and an accounting be had, if the complainant's title is unquestioned and irreparable injury is threatened; second, if the title is disputed and the defendant is in possession, and only the legal title is involved, the parties will be remanded to the law courts; then, third, if there should be present some equitable question, such as preventing a multiplicity of suits, or the

[71]Poindexter v. Henderson, Walker 176 (1824).
[72]Eskridge v. Eskridge, 51 Miss. 522 (1875); Warren Co. v. Gans, 80 Miss. 76, 31 So. 539 (1901); Lbr. Co. v. Bd. Sup., 89 Miss. 448, 42 So. 290 (1906).
[73]Nevitt et al v. Gillespie, 1 How. 108 (1834).

remedy at law is not clear, certain, or adequate, or the real interposition of equity is necessary to put an end to vexatious and ruinous litigation, equity will take jurisdiction and give whatever relief is necessary. The foregoing appears to have been announced by the court in subsequent cases.[74] It might be stated here, that although the committing of the waste is a past event, and there are no threats of future waste, equity still may take jurisdiction, if the admeasurement of damages would be impossible or inadequate in a law court, or if equitable interposition would prevent vexatious litigation, or it is a case of complicated accounting.

The first case where an injunction was sought to stay waste after the adoption of the Constitution of 1890, was the case of *Woods v. Riley.*[75] The facts in this case show that the real owner of the land was out of possession and the defendants in possession, claiming title adversely; that the principal value of the lands was timber, which the defendants were threatening to cut and remove; and, further, that the defendants were insolvent and could not be made to respond in damages. An injunction was granted to restrain the defendants from cutting the timber until the rights of the complainants could be determined. The court, after full deliberation, held that the Constitution of 1890, Sections 159b and 160, had materially extended and enlarged the jurisdiction of the equity court; that now, if there is present in a case any equitable ground for the taking of jurisdiction, the equity court will seize upon it and proceed, not only to give all necessary equitable relief, but also complete and final relief of all matters of a legal nature involved; that the presence of a disputed legal title, in a case of waste, with the defendant in possession, did not prevent the court from fully and finally disposing of the adverse claim of legal title by defendant. In a subsequent case[76] to *Woods v. Riley,* where the lessee had cut timber on Sixteenth Section Lands, and was thereby guilty of waste, the court held that where the equity court has taken jurisdiction for auxiliary purposes of discovery, this alone gave the court all necessary jurisdiction, and it could then grant full relief in the case, although the legal remedy may not have been exhausted, or "the legal title established by suit at law." The question may be raised under the new practice, whether it is necessary, in order to procure a temporary restraining order, pending the litigation, to restrain further waste, that it must be alleged and shown clearly that irreparable injury will result unless the injunctive process is granted. If the defendant is insolvent, and this fact is clearly shown,

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[74]Skipworth v. Dodd, 24 Miss. 467 (1852); Eskridge v. Eskridge, 51 Miss. 522 (1875); Cannon v. Barry, 59 Miss. 289 (1881).
[75]72 Miss. 75, 18 So. 384 (1894).
[76]Bomer Bros. v. Warren Co., 103 Miss. 343, 60 So. 328 (1913).

the writer's view is, that it will not be necessary to allege and show irreparable injury; but if the facts show the defendant is solvent, then the necessity will exist of alleging the irreparable injury.[77] Some of the courts have broken away from the ancient rule that it is necessary to allege and show irreparable injury before an injunction will issue, and the better reason appears to be on this side. If the injury threatened, or being done, is great or small, and goes to the permanent waste of the inheritance, it becomes a legal or equitable wrong, as the case may be, and should be enjoined at once and not allowed to continue until the litigation is at an end.[78] The defendant is fully protected by the complainant's bond, which he is required by statute to give in double the amount involved. If the complainant fails to make out his case, the court in its decree can give all proper damages the defendant can show he is entitled to by reason of the improper suing out of the writ.

Where a co-tenant is guilty of wilful and malicious waste, tending to substantially destroy the value of the property or estate, the other co-tenant is entitled to an injunction to restrain him. In such cases the restraining order possibly should be limited so as to restrain the defendant from devastating no more than one-half, if that be the interest of the defendant.[79]

From the foregoing it is indisputably established the Mississippi equity courts in the very earliest cases of waste coming before them, adopted and applied the equitable remedy given by the equity courts in waste cases in England and America prior to, and during the territorial and early days of the state's history. It is conclusive this remedy was the law of waste during this period.

WASTE IN CASES OF CURTESY

Curtesy was never established by statute in this state, but existed by common law. It was abolished, together with dower, by the Code of 1880.[80] Fortunately, we have one Mississippi case where a joint action was brought by the heirs and reversioners against the assignee of the tenant by curtesy for cutting trees for commercial purposes to the great injury of the inheritance.[81] The court very correctly stated that the common law of waste as put in practice by the English courts would be applied in solving the problems of the case, but in a modified form, to suit the

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[77]Freeman v. Ammons, 91 Miss. 672, 46 So. 61 (1908).

[78]Agate v. Lowenstien, 57 N. Y. 604 (1874); 92 Fla. 347, 109 So. 424 (1926); 204 Ala. 172, 85 So. 449 (1920); 128 Ga. 447, 57 S. E. 484 (1907), 10 L. R. A. (N. S.) 452; Abel v. Wireston, 143 Ky. 513, 136 S. W. 967 (1911).

[79]Leatherbury v. McInnis, 85 Miss. 160, 37 So. 1018 (1905).

[80]Code of 1880, § 1170.

[81]Learned v. Ogden, 80 Miss. 769, 32 So. 278, 92 ASR 621 (1902).

changed conditions of the new country, which abounded in wide forests. The law, upon its transplantation, allowed the tenant for life to open wild lands for agricultural purposes, as this meant an enhancement of the value of the inheritance, and not a devastation, as in England. The tenant was allowed to sell and dispose of, for his own profit, such trees as were felled in clearing the land; but the court held that cutting the trees on the lands, not for making repairs, nor for fuel and other necessaries, and not for proper agricultural purposes, but purely and alone for profit, constituted waste in this country as well as in England. The law in all of the American states is to the effect that the tenant by curtesy, as an incident to the estate, which the law gives him, may take reasonable estovers of every kind, and may even cut and sell the timber to pay the taxes on the land. This is necessary for the protection and preservation of the estate. A tenant by curtesy is not an agent of the reversioner with power to bind him, or his estate by contracts, liens, or otherwise. He is simply entitled to the use of the estate, and he must use it in a tenant-like and husbandry-like manner during the years of his life estate. Any cutting and selling of timber, tearing down of the houses, not consistent with the foregoing, is an injury and damage to the inheritance, and constitutes waste, for which the tenant by curtesy, or his assignee, is liable.

It is the legal duty of the tenant by curtesy to protect the estate from injury, and a failure on his part to do so, except in the case of injury by vis major, or the public enemy, makes him liable to the reversioner in an action for damages. He has the right of the common law to sue one trespassing, or committing wanton injury on the estate, but his failure to do so does not prevent suit against his assignee by the remainderman or reversioner for wrongs committed against the inheritance by the assignee.

WASTE BY TENANT FOR LIFE AND YEARS UNDER MISSISSIPPI DECISIONS

A definition of waste as given by the Mississippi cases might be briefly considered to be an injury to the remainder or reversion (the fee); something that lessens the value of the estate. But the act must grow out of voluntary waste. Ameliorating waste in this state is not actionable.[82]

The doctrine of waste as applied to tenants for life or years in England at the time of the emigration has been largely adopted in a more or less modified form in all of the states of the Union, and also

[82]Lbr. Co. v. Bd. Sup. Harrison Co., 89 Miss. 448, 42 So. 290 (1906); Cannon v. Barry, 59 Miss. 289, 303 (1881).

in this state, but only insofar as it is suitable to our condition and circumstances as a new and growing country.[83] The rigid common law rule brought over from England, an old settled country, where timber was scarce and valuable, and where any destruction of it lessened the value of the inheritance, has never prevailed in this state. The cutting of timber for estovers was barely permissible under the ancient common law, but in this country the life tenant is allowed to cut the timber for the purpose of clearing and cultivating so much of the estate as the needs of his family may require for their support and maintenance. The timber cut for this purpose may be sold and the proceeds appropriated by the tenant. The test is, how much would a prudent farmer, the owner of the fee, and having due regard to the inheritance of the estate, cut. He must leave sufficient uncleared land and timber for the permanent use and enjoyment of the inheritance.[84] Any cutting beyond the foregoing will be waste, and will subject the tenant to an action of damages.[85] The tenant must use tenant-like care, that is, use good husbandry, but this does not mean he must make substantial or lasting improvements. The law never holds him liable for what is termed ordinary "wear and tear." The building of new fences and necessary houses, repairing of old fences, with the foregoing in mind, is permissible by the tenant for life or years. The tearing down of a cabin and rebuilding it in the same or a more advantageous location is not waste.[86] If it becomes necessary, the life tenant may cut and sell the timber for the purpose of paying the taxes legally due on the lands, just as the tenant by curtesy could, or for the purpose of redeeming the land if sold for taxes. In fact, it is his duty, if he has no other means of paying the taxes to use the timber for this purpose. But in so using it, he must not impair the value of the inheritance.[87]

By contract the tenant may be made unimpeachable for waste, unless the waste falls within the purview of what might be termed equitable waste.

If the tenant for life or years is guilty of voluntary waste, such as demolishing houses, removing or permitting to be removed, fixtures useful and necessary to the proper enjoyment of the inheritance, he will be liable for all damages suffered by the remainderman or reversioner.[88]

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[83]Noonan Case, 1 S. & M. 562 (1844); Powell v. Brandon, 24 Miss. 343 (1852); Green v. Weller, 32 Miss. 650 (1856); Cannon v. Barry, 59 Miss. 289 (1881); Warren Co. v. Gans, 80 Miss. 76, 31 So. 539 (1901); Lbr. Co. v. Bd. Sup. Harrison Co., 89 Miss. 448, 42 So. 290 (1906).

[84]*Ibid.*

[85]*Ibid.*

[86]Cannon v. Barry, 59 Miss. 289 (1881).

[87]Warren Co. v. Gans, 80 Miss. 76, 31 So. 539 (1901); Cannon v. Barry, 59 Miss. 289 (1881); Jefferson Davis Co. v. Long et. al., 94 Miss. 530, 49 So. 611 (1909).

[88]Cannon v. Barry, 59 Miss. 289 (1881).

Equity, it is said by our courts, will not entertain a suit for permissive waste suffered to take place by the life tenant.[89] If the permissive waste is the result of wilfulness, deliberate in its nature, where the inheritance is devastated, it is believed equity will give a remedy. The question of permissive waste has given rise to much conflict of opinion among law writers and the courts. The weight of authority in this country is to the effect that the tenant guilty of such waste is liable in damages. The writer, in view of the overwhelming weight of authority in favor of damages in such cases, and further in view of the soundness of the views of the courts holding this way, is of the opinion that when this matter is again presented to our Supreme Court it will change the law on this question. There does not seem to exist any well-grounded reason, in law or fact, why the holdings of courts representing the weight of authority should not prevail, especially in cases where the commission of waste grows out of the tenant's negligence.

It is for the jury to decide, whether the act of voluntary waste is such as a prudent farmer would commit, having due regard to the lands as an inheritance, and whether the doing of it damages the value of the land as an estate.

The assignee of the tenant is liable for waste committed by him,[90] and the original tenant cannot be held liable, unless he remains in possession, or assumes the liability by contract express or implied. The tenant has no legal right to assign to a stranger the right to enter and cut trees, and the stranger so entering and cutting trees becomes a trespasser vi et armis, and is liable in an action of trespass to the remainderman or reversioner.

The tenant by year, or years, is not clothed with the same rights as the life tenant in clearing the land and cutting the timber. His legal right, if any he has, must grow out of contract, express or implied. If he cuts timber for any purposes other than for necessary fuel and repairs, he is liable to the remainderman or reversioner for waste.[91] He has no right to clear additional lands for agricultural purposes, or to sell the timber cut therefrom, unless his lease contract warrants it. If the clearing for cultivation amounts to ameliorating waste, he will not be liable for damages, but will be liable for timber sold.

The most interesting and informative Mississippi case on the law of waste, as it concerns the life tenant and the tenant for years, is the *Lumber Company Case*.[92] In this case the Lumber Company was cutting

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[89]*Ibid.*
[90]Lbr. Co. v. Bd. of Sup. Harrison Co., 89 Miss. 448, 42 So. 290 (1906).
[91]Milton v. Lowrey, 74 Miss. 487, 21 So. 243 (1897).
[92]89 Miss. 448, 42 So. 290 (1906).

the pine timber from Sixteenth Section Lands and converting it into lumber for commercial purposes. The Company had secured a 99-year lease on the land, as the statute provided, and contended that under the law pertaining to such leases it had the right to enter, cut, and dispose of the timber, which constituted practically the sole value of the land, for commercial purposes, without being guilty of waste. The court, on the first hearing of the case, held the Lumber Company had this right and were clearly not liable for waste. A motion was made for a re-hearing, and in the meantime the personnel of the court changed. On the re-hearing the court reversed itself and held the Lumber Company had committed waste and was liable therefor to the remainderman or reversioners. This case attracted considerable attention at the time in legal circles. The decision has been cited by many state courts, together with the Supreme Court of the United States, as an outsanding authority on the questions involved.

The writer agrees with the conclusion reached by the court on the re-hearing, but does not agree with the argument and reasoning set forth by the court in reaching its conclusion. The opinion of the court rendered by Judge Mayes is a very strong ,well-reasoned opinion, but the concurring opinion by Justice Whitfield is wonderful by reason of the scholarship, research, and legal acumen displayed. The fundamental defects, as the writer sees it, in the reasoning of the court in the main and concurring opinions are three: (a) the court reaches the conclusion that the common law action of waste in this state is the common law of England as developed subsequent to, and under the influence of, the principles to be found in the statutes of Marlbridge and Gloucester; (b) that the statutes of Marlbridge and Gloucester became merged into and finally formed a part and parcel of the common law of England, and, then, upon the transplantation, they became a part of the common law of Mississippi, but in a modified form, in order to fit into the changed conditions in the state; (c) that our abrogating act did not reach or have any effect upon these two statutes. It is true that in practically all of the states of the Union, together with the District of Columbia, the statutes of Marlbridge and Gloucester, whether expressly re-enacted or not, were held by the courts to be a part of the common law of waste in a modified form in order to suit the changed conditions in this country. But it is necessary to bear in mind in the discussion, this very important and fundamental fact, that Mississippi was the only state in the Union to abrogate outright all of the statute laws of England and Great Britain. If this had taken place in the other states who can say they would then have held that these statutes were a part of the common law? The result was, as repeatedly announced by our courts, that no English

statute prior to the date of the abrogation had any *force, effect, or validity* in this state. Is there any logical or sound reason that may be assigned as to why the statutes of Marlbridge and Gloucester alone should have run the gauntlet of our abrogating law? None, absolutely none. The English statutes, concerning land laws, which our decisions have declared to be null and invalid in this state, because of the abrogating act, were just as much a part of the common law of England, if such was possible, as the statutes of Marlbridge and Gloucester. No rational explanation can be given as to why the land statutes are held to be of no effect and the waste statutes effective. It is begging the question. There is not a word in the abrogating act which will justify any such conclusion. There are no facts surrounding the passage of the act to justify it. The conclusion is a forced one. There is no authority for it. The rational solution of the whole problem is, that there existed in England prior to the statutes of Marlbridge and Gloucester, as has heretofore been stated, the substantive mediaeval common law action of waste in the cases of a life tenant, a tenant for years, a tenant in dower, and tenant by curtesy, and guardian in chivalry. The statutes of Marlbridge and Gloucester, insofar as the substantive action of waste is involved, but restated the substantive common law action of waste. These statutes neither enlarged, limited, nor in any wise modified the substantion action itself. They changed the remedy. Confusion will arise unless the distinction between the substantive action and the remedy is clearly borne in mind in a discussion of the question. Subsequent to the statutes of Marlbridge and Gloucester, no new substantive action of waste by statute or common law was created, so that there never existed in England any substantive action of waste, save that of the mediaeval common law. It is true that the statutes of Marlbridge and Gloucester in a modified form, because of the holding of the Supreme Court of the United States, were operative in the Mississippi Territory until the Act of February 10, 1807, of the General Assembly. This was the abrogating act, and subsequent to this act these statutes and any principles that might be said to grow out of them were wholly inoperative in the Mississippi Territory or in the state after it came into the Union. Immediately upon the abrogation of the statutes by the act of February 10, 1807, the old mediaeval substantive common law action of waste which had been suspended during the life of the statutes, automatically became operative.

The mediaeval common law remedies were abolished by the statutes of Marlbridge and Gloucester and new statutory remedies created by these statutes, together with certain penalties. These remedies, however, gradually fell into disuse in England, and were largely superseded by the common law action on the case in the nature of waste, purely a common law creation.

The common law action on the case in the nature of waste creates no new action; it creates, as was intended, a remedy, the remedy of single damages for waste, as opposed to the writ of waste, with treble damages and forfeiture, under the Statute of Gloucester. After the common law had brought into existence the remedy of single damages, through an action on the case, the reversioner or remainderman could elect to proceed either under the Statute of Gloucester or by an action on the case in the nature of waste. The latter procedure was the common law, and the Statute of Gloucester never in the writer's view, became merged into and regarded as the common law. It was, in a sense, a part of the common law, because it restated the old mediaeval common law action of waste. Our ancestors then brought to this country these statutes as a part of the common law, in this sense, together with the action on the case, and the equitable remedy of injunction and account,—all just as they existed in England at the time,—but with such modifications as common sense dictated under the greatly changed and altered conditions existing in a new country.

They were brought to the Mississippi Territory through the agency of its Organic Act, and were operative after the civil law gave way, in the same manner they were operative in the thirteen states, until the General Assembly of the territory abrogated, repudiated, and made of none effect all British and English Statutes. The intent and purpose of the abrogating act was to destroy, root and branch, any effect the English Statutes might have as law in the territory and state.

This position is fortified by every Mississippi Decision touching upon the question prior to the *Lumber Company* case.

The remedy of action on the case, together with the remedy by injunctive relief in equity, was the remedy used in the territorial days subsequent to the civil law, and the abrogating act, and continues to be the remedy to this day, free from the slightest influence of the statutes of Marlbridge and Gloucester. This is borne out by the holding of our Supreme Court in the *Gans Case,*[93] where it says, ". . . the writ of estrepement and waste, both in England and this country, have generally fallen into disuse, or have been abolished, or are now of rare occurrence, having given way to an action on the case in the nature of waste."

In the *Emrich Case,*[94] it was held that damages at common law could be recovered in action for mesne profits, if a count is set out in the declaration demanding such damages. No other cases of this kind appear among the Mississippi decisions, and it is the writer's opinion no such damages can now be recovered under the statutes.

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[93]Warren Co. v. Gans, 80 Miss. 76, 31 So. 539 (1901).
[94]John Emrich v. Michael Ireland, 55 Miss. 390 (1877).

A RE-EXAMINATION OF OUR LEGAL RIGHTS*

WEX S. MALONE**

In the preceeding installment of this article we saw that the type of legal thing prevalent in past years did little more than justify the system of law established at the time, and sought to perpetuate it in abstract form through the concept of *right*. Likewise we saw that the term *right* is on analysis only descriptive of what the law has already done. However, no one can deny that legal philosophers have made a real contribution in pointing out that through the use of the concept of right the legal institution can be described in terms of the product of its labor. The operating scheme of law is effectively securing certain human wants which have become integrated into the legal fabric, and these must be distinguished from those wants or interests of society which have found no expression in the legal equation. Drawing this distinction has been the most useful function of the analytical school of jurisprudence of the Nineteenth Century. The real danger lies in the tendency of legal thinkers to confuse the legally recognized right with the end and purpose of the law, in an ignorance of the distinction between what the law *is* doing and what it *should* do.

Rights are the convenient and proper instruments whereby the law seeks to fulfill its function as an ordering force in society, and we could no easier abandon them than we could abandon the remedy afforded by the law, for both are functional attributes of the working legal scheme. But it is incumbent on us to see them in their proper perspective as convenient concepts of utilitarian origin. They are instruments to aid in the achievement of justice, but they are not justice itself. When rights are regarded as tools rather than as the job to be accomplished with those tools they can be brought down to earth and scrutinized more fairly and critically. So long as they are looked on as talismen and sacred beyond inquiry they must remain obscure, useless objects of a blind veneration.

In demoting the right from its exalted position down to a means available to the legal system for the purpose of achieving justice we impair neither the stability nor the uniformity, of the law. The carpenter with rule in hand does not draw a line less straight when he consciously recognizes that the final purpose of his task is the con-

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struction of a house. He realizes rather that his task is broader than the single line he is drawing, and is enabled to see each unit of his labor in its proper perspective to the completed whole to be achieved. Sureness and uniformity of instruments are important equally to carpenter and lawyer, yet they are valueless except as their use can be correlated towards the achievement of a definite predetermined task. No sensible carpenter would work solely for the joy of hearing the pounding of his hammer or the crunch of his saw, nor would he draw a line simply for the purpose of making it straight. Yet many jurists are satisfied to participate only in the dull phenomenon of a law busily engaged in securing its own pre-established rights all inadvertent to the cry of the new and pressing interests of an increasingly complex civilization.

If we are to discover the real end or purpose of any institution functioning in the social order we must look beyond its mere internal philosophy. We can not determine whether a man is successful in business by an examination of his brain or nervous system, neither can we determine the success of legal operation by examining the rights which have already become integrated into the fiber of the law. Our study must be, not of an isolated machine operating in vacuum, but of one functioning in a society of men and which bears very definite but subtle and complex relations to that society. In other words, we must seek to determine what social interests the law has secured in the past, what it is now securing, and what it can effectively secure in the future.

We may approach any system of law from either the logical or the historical viewpoint. In the former instance we proceed analytically with a selected group of rights which are subject to invasion or interference. This interference we term a wrong, and we seek to prevent it by imposing a remedy.

> "A system of laws promulgated by a lawyer of sufficient wisdom and illimitable foresight would undoubtedly commence with a definition of rights, and thence to prescribe duties, thence to prohibit wrongs, and finally to prescribe legal remedies."[1]

However, as Justice Holmes tersely remarked, "The life of the law is not logic, it is experience."[2] No legal system has ever theorized its way into existence. History shows us that the legal right, far from being the starting point of the law, is a comparatively recent product of the sophisticated mind. If we are to trace the course of legal development we must start at the other end, beginning with conflict, proceeding thence to adjudication, from adjudication through remedy to wrong, and finally

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[1] ROBINSON, ELEMENTS OF AMERICAN JURISPRUDENCE, 155.
[2] HOLMES, THE COMMON LAW, 1.

to right. Our first inquiry should be of the early law which cradled the germs of our present legal system.

The law of primitive people and its influence on the legal scheme of today has been so frequently and ably treated[3] that the writer will attempt to do no more than roughly point out some of its outstanding features having a particular bearing on our present discussion. All legal historians agree that law is rooted in a desire to avenge insult to family honor. The importance of maintaining honor must be manifest, for no family could live peaceably with barbaric neighbors if it could not command their respect and fear. As an instrument of revenge the blood feud is a common characteristic of semi-civilized people, and often resulted in bloodshed or even the devastation of entire communities. Thus there was early asserted in primitive civilization a pressing need for some substitute for the revenge motive and self-help, and the first function of archaic law was to effect a composition of the feud, at first partial and through voluntary acquiescence, later universal and compulsory.

Composition of the blood feud must be carefully distinguished from our modern idea of legal compensation for an infraction of a right. The function of the latter is to repair an individual loss, to make amends for the inflicted injury. Hence the extent of the remedy today is measured in terms of what will compensate the complainant and make him whole. On the other hand composition was designed solely to preserve peace and order. Its mission was to salve the injured pride and provide a substitute for self-help. In other words, it played the part of synthetic redress. Hence the extent of the remedy of ancient law was commensurate with the probability that the injury complained of would outrage the family sense of honor and arouse the desire to be revenged. It is no wonder that primitive law was more cognizant of a superficial scar which would hold its recipient up to contempt and ridicule than of a less conspicuous but more serious internal injury.

Likewise, a law substituted for revenge must operate directly against the offender, be it man, slave, beast, or inanimate object.[4] One legal writer describes a most amusing and futile effort of an entire community to subject a swarm of gnats to judgment, and of another to seek redress against a hive of obnoxious bees.[5] It was provided in ancient Hindu

[3]HARTLAND, PRIMITIVE LAW; MAINE, ANCIENT LAW; HOLMES, THE COMMON LAW, Lecture 1. In this paper the writer has followed the scheme of development used by Roscoe Pound, Dean of the Harvard School of Law, in an article entitled, *The End of Law as Developed in Legal Rules and Doctrines* (1914) 27 HARV. L. REV., 195, and is indebted to this source for much of his material.

[4]A classic example of this is found in the *Solon of Plutarch*: "He (Draco) likewise enacted a law for the reparation of damages received from beasts. A dog that bit a man was to be delivered up bound to a log four cubits long."

[5]Coates, *Crime and Punishment* (1931) North Carolina Bar Association, 80-100.

law that a tree falling by chance on a man should be felled by his family and chopped to bits.[6] This will probably be understood by any reader who has felt the urge to kick some object over which he has stumbled in the street. The desire for revenge knows no nice distinctions of causation, and hence any law which acts as a substitute therefor must proceed on the same footing.

The usual procedure of composition was an order that the offender be delivered to the incensed complainant to do with as he saw fit. If it were a slave, animal, or object, the owner was hailed into court only because he offered the sole means whereby the obnoxious cause of insult might be delivered up for vengeance. Although he might be called on to answer in money, yet the payment was regarded either as supplementary or as a fine for his failure to hand over the real offender.[7]

The needs of such a law were finality, definiteness, and ceremonial. To an untutored people fine gradations of conduct and abstract generalizations of right and wrong were meaningless. Hence there were no operative concepts of right and wrong around which the legal system could revolve, and had there been such there was no time to ponder over niceties of behavior or refined abstractions with private warfare in the offing. However, no institution for the arbitration of disputes can operate without the aid of some factor of constant quality to which the decisions of the tribunal may be referred. Primitive man was by no means at a loss for an effective device to fulfill this function. Close at hand in the institution of religion and easily adaptable to law was the ceremonial. It became the mainstay of legal adjudication, not only because it was in keeping with primitive habits, but because its operation was objective. It presented in concrete observable form ideas of justice which were otherwise inarticulate. Likewise it was dramatic in content and achieved a reality difficult for the modern mind to understand.

To the barbarian the ceremonial presented an outward show of something being done and thereby created a semblance of finality quite as real in appearance as though it bore some actual relation to the fact it purported to determine. A blood feud might easily be brought to a final determination through a trial by battle. In this way, by annihilating his adversary the winner established conclusively that he was in the right. In like manner the institutions of ordeal by fire and water be-

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[6] 1 TYLER, PRIMITIVE CULTURE (Am. Ed.) 286. A similar idea prevailed in the early common law. "Where a man is killed by a cart, or by the fall of a house, or in other like manner, and the thing in motion is the cause of the death, it shall be deodand." Year Book, 30 and 31, Ed. 1, pp. 524, 525.

[7] "Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default shall be in the owner." 2 DIAL, DOCTOR AND STUDENT, c. 51.

came entrenched in the legal system. A handful of white hot iron or a severe ducking in the lake were sufficient to determine beyond doubt the guilt or innocence of any accused person.

The religious origin of legal ceremony is clearly demonstrated in the ancient rite at law known as *compurgation.* Twelve men, more or less, sometimes known as *sacramentales,* appeared in a church and swore upon the altar that the accused was innocent. The compurgators did not swear to knowledge of facts. "If the accused is guilty may we be punished as if our oath were his!" That was the invocation. And the idea appears to have been that no twelve men would take such a risk of the divine wrath in a case where punishment was merited.[8]

The formal dogmatic quality of ancient law was not confined to its mode of procedure. Injuries and remedies alike were crystallized into definite minute particulars. The codes of archaic law listed each recognized wrong and prescribed definite punishments.[9] Here again the reason is the same; there was no generalization of the idea of right and wrong from which the existence of concrete offenses could be logically deduced. We find only a constantly growing list of those injuries within the compass of the law and a predetermined remedy for each.

Such grossly were the features characteristic of all systems of archaic law. Each system differed from the others in details, depending on racial differences and variations in environment, but all followed the same general path of development. Primitive law may be defined as (1) an institution evolved to abolish self-help and revenge through composition, (2) operating directly on the offender (3) through formalism rather than abstract concepts of the legally right and wrong, and (4) prescribing particular remedies for particular injuries. Nowhere do we find the idea of legal right in early law, yet we do find a definite end and purpose of the legal system, namely, a preservation of peace and order.

The importance of formalism, not only in the birth of the law, but in its development as well, can hardly be over-emphasized. Today we regard the *form* as the hull or shell molded for the particular purpose of preserving a something we call the *substance,* and it is this contained

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[8]THAYER, *Sacramental Features of Ancient Law* (1901) 14 HARV. L. REV. 509, 511. The reader is referred to this excellent article for many interesting characteristics of archic law directly attributable to religion.

[9]A typical provision from the Twelve Tables of Gortyna (Cir. 450-350 B. C.) follows: "If one lie by force with a freeman or freewoman, he shall restore a hundred staters, but if with (the man or woman) of a clubless person, ten staters. If a slave (force) a freeman or freewoman, he shall restore twofold, and if a freeman (force) a male or female householder, five drachms; and if a male householder (force) a male or female householder, five staters." See also, CODE OF HAMMURABI, § 196-214 (Harper's transl.); Laws of Alfred, § 24 (translated in I THORPE, ANCIENT LAWS OF ENGLAND, 79.)

substance which is looked on as the real and all important thing. Being formal connotes superficiality to the logical mind; it is only a surface phenomenon. Following this line of thought we tend to regard legal forms of action simply as concrete means of translating the substantive rights of law into overt activity. Rights are the real essential things, we say, and actions only represent the way they are made enforceable. Yet, as we have seen, the formal aspect or ceremonial of the law far antedates any scheme of rights we know. Just as the die precedes the coin, so the form of action was the mold which later was to produce the abstract right stamped in its own image. Procedure is the mother of the legal scheme, and the division of law into substantive and adjective is a product of recent years.[10]

We saw that formalism came into the law because it presented an outward show of something being done and brought to a definite conclusion. Being inexorable in operation it prevented quibbling and dispute. Heads I do, tails I don't, has decided many a course of conduct and translated indecision into action. Let us but be confronted with the necessity of making a determination where we can not bring a trained reason to bear and our immediate resort is to the hocus-pocus of empty formalism.

Once the form rooted itself in the legal equation it stubbornly resisted change. It easily acquired the characteristic of precedent and tended as such to perpetuate itself to the exclusion of other features of the law. Another factor contributed to its entrenchment. As government became more centralized and the feud disappeared resort to the legal tribunal became compulsory and universal. The law expanded its activity, superseding self-help and relegating the church to the sphere of the moral and spiritual. With this strengthening of the legal power there arose an increasing fear of arbitrary action on the part of the court and a consequent demand for a relentless uniformity in the operation of the law. This demand found response in the rigidity of formal procedure, for dogmatic forms of action which must be closely adhered to in every minute detail offered a ready bulwark against any capricious tendency in the courts.

The period of Strict Law which resulted was marked by the evolution of the traditional writs of the common law issued from the King's Bench limiting the actionable grievances of Englishmen to those cases for which a formal precedent for procedure could be found in the Register of Writs. Into these rigid forms it was incumbent on the plaintiff to mold his facts if he was to recover, and through them the court tried his theory rather than his case. Even late in the history

[10]3 STREET, FOUNDATIONS OF LEGAL LIABILITY, c. 1.

of law we find an elaborate juggling of forms rather than an adjudication of rights. The needs of a primitive civilization found legal utterance in a formalism which expressed and then congealed them. As time went on these early needs disappeared or were surplanted by newer and more complex ones as society became increasingly manifold and subtle in its relationships. Yet the older ideas of law preserved in the rigid self-perpetuating form of action continued to rule the realm of law and mark the outside limits of legal redress. The necessary result was an increasing list of wrongs recognized by society as only moral and not remediable at law, and another list made up of those injuries for which there was legal recognition because they could be squeezed into the confines of the established forms of action. We may define this phenomenon as a continuous pressure against the law from outside by unsecured interests seeking recognition and, as a result, a continual straining of the legal formula to its limits.

Now although the form of action cannot break, it can nevertheless expand. The points of expansion will be uneven, varying with the force of the particular interest and the weakness of the particular formula, for each expansion marks the incorporation of some new social want. The consequence is a more comprehensive but less regular structure of law. This process is not the product of chance but of experience. It is the direct result of judicial effort to adapt the static form to the changing need and yet maintain its superficial integrity. The secret of all the law's defects, its irregularities, its incompleteness is found in this.

Let us now inquire as to how the doctrine of rights came to be established as the pinnacle or ultimate criterion of legal thinking. In the first place we will remember that it was characteristic of primitive law to particularize each recognized injury and its concomitant remedy. The Mosaic Code abounds in 'Thou Shalt Nots' set forth in great detail. The idea of imposed restraint and prohibited action is the first legal commentary the mind can make. In this way the idea of *duty* was early fixed in the law. Perhaps it would be more accurate to say the idea of *duties,* for the restraint was not at first against a general classified activity but rather a command to refrain from certain enumerated offenses. Later, with the expansion of the form of action the restraints became grouped into categories according to their common characteristics. Thus, particular physical invasions of the person or possession were no longer thought of as an aggregation of isolated injuries, each with its independent remedy. Rather they clustered around a central idea tied together by a common thread of reason. Regarded from this more comprehensive point of view they represented a *type* of prohibited conduct with a single don't or restraint remedied through a single cause of action known as trespass. In this way there evolved the idea of legal duty.

There are two aspects to the concept of duty. On the one hand it can be seen from the viewpoint of the person towards whom the prohibitive mandate of the law is directed. Likewise it can be treated in terms of the person or persons who can exact the penalty for a violation of the prohibition. This may be illustrated as follow: the law, we say, prohibits each member of society from making any physical aggression against the person or possession of any other member. Thus, A being under the restraint of the law, owes a duty to B, representing any other member of society, not to make such an invasion. Looking at the matter analytically we have created a legal relation between A and B. From A's terminus this is duty. From B's terminus it is regarded as a *right.* That is to say, B is the beneficiary of A's duty; he has a *right* against invasion. The two ideas are correlative, and cannot exist separately. Equally they derive their validity from the inhibitive force of the law. Fundamentally a right is no more important than a duty and in fact is the much later conception of the two.

> ". . . The conception of right as the correlative of duty is an entirely modern acquisition in legal science: Bentham (18th Century) and Austin (19th Century) contributed more than anyone else to familiarize the term. Since their day schemes of law have attempted to substitute *right* in the place of *duty* as a basis of legal classification.
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> "Legal conceptions have consequently been largely recast and the attempt has been made to define everything in terms of *right.* The Roman lawyers could not classify from this point of view because they had not attained to it. They knew nothing of a *right* or *rights,* though, of course, they had an accurate notion of law in general, of particular laws, and of things that are right. The circumstance that the modern continental systems of law have only one word for *right* and *law*[11] serves as a reminder of the fact that Roman law stopped short of the notion embodied in *right.* In that system the conception of duty or legal obligation apparently occupies the point of central interest. Modern law, on the other hand, prefers to look at legal rules from the standpoint of rights. Possibly political speculation in the Eighteenth Century had something to do with this transition, for the talk about rights comports well with democratic tendencies."[12]

As the concepts of duty and right came into legal usage jurists were enabled to deal more adroitly with the scheme of laws. With the aid of its new tools the judicial mind could mediate among a host of particular injuries and arrange them in terms of principle. In this way net fishing

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[11]The Latin 'jus', the German 'recht', the Italian 'diretto', and the French 'droit' are used in both senses. This is a source of much ambiguity.

[12]3 STREET, FOUNDATIONS OF LEGAL LIABILITY, 6.

was substituted for a multitude of hooks and lines. Law became ostensibly a logical science. But we cannot increase the number of fish in a pond by changing our method of catching them, and likewise we cannot escape the limits of the form of action by describing its mechanics in terms of right and duty even though we thereby squeeze out the last ounce of its potential good. So long as redress at law was limited to only those cases whose facts could be fitted into a preexisting form that form must of necessity circumscribe the outermost limits of legal right and duty.

Logical deduction in terms of abstract principle contributes to the world of law by enabling the judge to deal effectively and uniformly with the material given him. He can sift the heterogeneous mass of cases through the sieve of principle until their contents are reduced to simplest rudiments. But he cannot transcend the material given in the form. For example, actions *ex delicto* against the person were represented only by the writ of trespass. The scope of this writ admitted only a direct and immediate intentional injury. No amount of abstraction in terms of duty could serve to allow redress for negligence or other indirect wrongs outside the compass of the action. It remained for a separate and later writ to furnish relief.[13]

The introduction of logical symmetry through the use of permeating principle emphasized the tendency of the law towards self-sufficiency. Outgrown forms of action took on a new life of logic and reason, and the law stagnated in abstract thought. The result was that the legal system assumed a metaphysical relation towards life rather than a real one. We have already seen that law and morals coexisted side by side in separate air-tight compartments. This does not mean that the law was immoral. Rather it was *unmoral* in that it excluded everything that could not fit into its scheme of reason and form.[14]

Individualism became fixed in the law through the popular demand for uniformity already seen. It was an indispensable doctrine for justifying the unmoral aspect of the legal system. An excellent illustration of this is furnished in the history of the law of obligations. Early law

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[13]The action of trespass on the case was allowed by the STATUTE OF WESTMINISTER II C. 24 (1285): "Whenever from henceforth it shall happen in the chancery that in one case a writ is found, and in like case falling under like law and requiring like remedy no writ is found, the clerks in chancery shall agree in framing the writ, or the plaintiffs may adjourn it until the next parliament; and the case in which they can not agree shall be reduced to writing and referred to the next parliament, and there by consent of men learned in the law writs shall be framed, lest in the future the King's Court shall fail in administering justice to complainants."

[14]POUND, LAW AND MORALS (2d ed.); Ames, *Law and Morals* (1908) 22 HARV. L. REV. 97.

had no action for enforcing promises, for the modern doctrine of contract did not mature until the Seventeenth Century.[15]

Prior to this time the law was enforcing covenants, but these were actionable as *things,* not as promises. The requirements of seal, delivery, and presentation of the physical covenant were the essence of the right to recover, nor would the law look behind the document itself for any irregularity. The enforcement of promises *per se* was considered to be a function of the church. In justification of its limited field of operation the law placed the self-reliant individual on a pedestal, and in doing so met a ready response in the philosophy of a people who still retained many of the characteristics of a barbaric and rugged independent life. The idea seems to have been that the self-reliant man would not complain of the hardships of his bargain. He was free to enter into his transaction with due legal formalities or not, as he saw fit. If he chose the wrong procedure he must grin and bear the consequences.

The foregoing remarks characterize the period of strict law. During this epoch the end and purpose of the law seems to have been to achieve an uncompromising uniformity of legal operation arising in formalism and reinforced by logical abstraction. It marked the separation of law and morals and the introduction of the doctrine of individualism. As social interests became increasingly acute and exerted more pressure against the law for recognition a reaction set in. The result was a process of liberalization of the law through the rise of equity and natural law ideals. This will be considered in the following and concluding installment of this article.

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[15]It was not until Slade's Case (1602), 4 Coke 92a that the court allowed an action in assumpsit on a debt without the necessity of proving an express promise to pay a precedent debt made subsequent to the creation of such debt.

NATIONAL HOUSING ACT

ERNEST P. JONES, JR.*

Coeval with the existence of civilized society, home has been looked upon as a spot of earth "supremely blessed." To know that one has an interest in a portion of the earth's surface, no matter how small, makes him proud of his rights, more interested in the welfare of his country and a better citizen in general.

Public Act number 479 of the 73rd Congress, which may be cited as the "National Housing Act" was approved by the President on June 27, 1934. It is divided into five titles. Title I is a temporary relief measure which deals with the modernization and repair of houses generally. Title II contains provisions for a Mutual Mortgage Insurance Plan, and Title III provides for the establishing of National Mortgage Associations. Title IV deals with the insurance of savings and loan accounts, and Title V contains miscellaneous amendments to existing laws. This discussion will relate to Titles I, II, and III, the administration of which is placed under a Federal Housing Administrator.

The greatest amount of present unemployment exists in the building trades. At the time of the passage of this Act, general construction had dropped from an annual pre-depression level of $11,000,000,000 to an annual level of around $3,000,000,000. Home construction had dropped from a $3,000,000,000 annual volume to a $300,000,000 volume. Millions of American homes, apartments, offices, factories and other buildings have suffered seriously from lack of normal care and attention. The situation presented an opportunity and a challenge to the Congress. The opportunity is not merely to stop the destruction of property values, but also to provide employment for workers who have suffered severely from the depression. To promote a program of modernization and repairs, Title I of the National Housing Act was enacted.

The President is authorized to create a Federal Housing Administration to carry out the provisions of Titles I, II, and III. All the powers of this Administration shall be exercised by a Federal Housing Administrator appointed by the President, by and with the advice and consent of the Senate. The Administrator is given broad powers to appoint employees, prescribe their authorities and fix their compensation. His own compensation is fixed at $10,000 a year.

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The Administrator is authorized, upon such terms as he may prescribe, to insure banks and other installment lending financial institutions which are approved by him, against losses which they may sustain as a result of loans and advances of credit made by them subsequent to the enactment of this act and prior to January 1, 1936, or such earlier date as the President may fix by proclamation. Such loans must be for the purpose of financing alterations, repairs and improvements upon real property. The amount of the insurance granted by the Administrator to any such financial institution is limited to twenty per centum of the total amount of the loans made by such financial institution for this purpose. That is to say, the Federal Housing Administration will reimburse any insured institution on one hundred per centum of its losses up to a total aggregate amount equal to twenty per centum of the total original face amount of all qualified notes taken or purchased during the time the insurance contract is in force. For example, if an insured institution made loans on qualified notes aggregating $100,000, it would have an insurance reserve of twenty per centum of that amount or $20,000. If it should have a complete loss on five notes of $1,000 each, the Federal Housing Administration would reimburse it on the full amount of this loss and its insurance reserve would then be reduced to $15,000.

Insurance cannot be granted to any financial institution on any obligation the face amount of which exceeds $2,000. The total liability which the Administrator may incur under such insurance shall not exceed $200,000,000, thus allowing insurance to be granted on $1,000,000,000 worth of credit. Insurance shall not be granted unless the obligation to the financial institution bears such interest, has such maturity, and contains such other terms and conditions as the Administrator shall prescribe.[1]

The Administrator is authorized to enter into loan agreements with insured institutions and to make loans to them upon the security of obligations covered by the insurance. Such loans may be made up to one hundred per centum of the current face value of the obligations offered as security, and be at such rates and upon such terms as the Administrator shall determine.

The Reconstruction Finance Corporation is directed under Section 4 of Title I to make available to the Administrator such funds as he may deem necessary for the purpose of carrying out the provisions of Titles I, II, and III. In the same Section the President is authorized in his discretion to provide funds by allotment to the Administrator from funds that are available to the President for emergency purposes.

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[1]Rules and Regulations governing the Modernization Credit Plan under Title I were issued by the Administrator on August 10, 1934.

The law requires an annual report by the Administrator to the Congress on January 1 of each year of his activities under Titles I, II, and III.

The purpose of the insurance under this Title is to make private funds available and not to encourage unsound loans or nonpayment of notes. The national Housing Act does not create a new government lending agency, but rather establishes a policy whereby private lending agencies are enabled to make loans to worthy borrowers with a government guarantee to take the place of endorsement or collateral which banks would otherwise have to require before accepting this type of paper.

TITLE II—MUTUAL MORTGAGE INSURANCE

Mutual Mortgage Insurance under Title II of the National Housing Act offers inducement to the creation of a mortgage market upon a sound basis. It is not a temporary measure, but a long term program. It offers a plan under Government leadership intended to help mortgagors and mortgagees protect themselves against violent swings in the real estate market beyond their control.

It is not necessary to recount the disastrous effects of the depression upon the real estate market. General unemployment brings about inability of borrowers to meet charges and causes foreclosures. Foreclosures bring about dumping of properties upon the market which causes decline in property values, and decline in values causes further foreclosures. Thus, a vicious circle is created. With this situation upon us, governmental agencies have stepped in in an effort to ease the strain and remove properties from the market by assisting in refinancing of mortgages. Now as we slowly emerge from the morass, and private institutions are getting into a position to take over home mortgage indebtedness, it is time to curtail the operation of such governmental agencies. The question which confronts us now is how are we to prepare ourselves to meet a possible return of this exact situation?

The Mutual Mortgage Insurance Plan under the National Housing Act amounts to contributions by borrowers to a fund to secure their lenders so that the lenders may more safely advance the borrowers' funds upon terms which are more desirable. It presents no wild scheme or no entirely new and unheard of plan. It suggests reform, not by coercion but by offering special inducement to the creation of a mortgage market upon a sound basis. It is estimated that the mortgage debt of the country is around $43,000,000,000. Of this amount, around $21,000,000,000 represents the mortgage debt against urban homes of $20,000 or less in value. These figures sufficiently show the enormity of the home mortgage debt problem.

Because of the varying conditions in different sections of the country, the insurance plan as outlined in the Act is in general language, leaving numerous questions to be determined by the Administrator. The plan calls for insurance of the mortgages which meet the provisions of the Act and the terms prescribed by the Administrator.[2]

To be eligible for insurance under the Act, a mortgage must—

(1) Be a first mortgage on real estate in fee simple or on a leasehold under a lease for not less than ninety-nine years which is renewable, or under a lease having a period of not less than fifty years to run upon which there is located a dwelling for not more than four families.

(2) Be offered to the Administrator for insurance within one year from the date of its execution.

(3) Be held by a mortgagee approved by the Administrator as responsible and able to service the mortgage properly.

(4) Involve a principal obligation (including such initial service charges and appraisal and other fees as the Administrator shall approve) in an amount not to exceed $16,000, and not to exceed eighty per centum of the appraised value of the property as of the date the mortgage is executed.

(5) Have a maturity satisfactory to the Administrator, but not to exceed twenty years.

(6) Contain complete amortization provisions satisfactory to the Administrator requiring periodic payments by the mortgagor not in excess of his reasonable ability to pay determined by the Administrator.

(7) Bear interest (exclusive of premium charges for insurance) at not to exceed five per centum per annum on the amount of the principal obligation outstanding at any time, or not to exceed six per centum per annum if the Administrator finds that in certain areas or under special circumstances the mortgage market demands it.

(8) Provide, in a manner satisfactory to the Administrator, for the application of the mortgagor's periodic payments to amortization of the principal of the mortgage.

(9) Contain such provisions with respect to insurance, repairs, alterations, payment of taxes, foreclosure proceedings, secondary liens, and other matters as the Administrator may in his discretion prescribe.

The Administrator is authorized to fix a premium charge for the insurance of mortgages to be determined in accordance with the risk involved, which in no case shall be less than one-half of one per centum nor more than one per centum per annum of the original face value of

[2]Regulations of the Federal Housing Administration covering operations under Title II of the National Housing Act were issued on November 1, 1934.

the mortgage. This insurance premium shall be payable annually in advance by the mortgagee but will be borne by the mortgagor. If the Administrator finds, upon the presentation of a mortgage for insurance and the tender of the initial premium charge, that the mortgage complies with the provisions of the Act and the regulations of the Administration, such mortgage may be accepted for insurance. The Act provides that no mortgage shall be accepted for insurance unless the Administrator finds that the project with respect to which the mortgage is executed is economically sound.

Except with the approval of the President, the aggregate principal obligation of all mortgages on property and low-cost housing projects existing on the date of the enactment of this Act and insured under this title shall not exceed $1,000,000,000 and the insurance of mortgages on property and low-cost housing projects constructed after the passage of this act shall be limited to a similar amount.

The Administrator is not authorized to insure a loan prior to the completion of the dwelling. However, he is expressly given power to make commitments for the insuring of mortgages prior to the date of their execution or disbursement thereon. An amendment to the Federal Reserve Act (Section 505, Title V of the National Housing Act) provides that loans made for financing the construction of dwellings and having a maturity not to exceed six months shall not be considered as loans secured by real estate within the meaning of that Act, but shall be classified as ordinary commercial loans. This amendment further provides that such loans may be eligible for discount as commercial paper. Thus, the program as a whole, including this amendment, should assure to qualified builders a more plentiful supply of funds for sound construction purposes.

Insured mortgages will be classified and segregated into separate groups containing substantially similar risks and having similar maturity dates. Premium charges received for insurance of any mortgage and all earnings on the assets of the group account shall be credited to the account of the group to which the mortgage is assigned. Charges growing out of any mortgage shall be paid from the account to which such mortgage is assigned. The Administrator shall also provide, in addition to the several group accounts, a general reinsurance account, the credit in which shall be available to cover charges against such group accounts where the amounts credited to such group accounts are insufficient to cover charges against them. The general operating expenses of the Administration may be allocated to the several accounts or charged to the general reinsurance account. Out of the funds made available to the Administrator, $10,000,000 is set aside as a Mutual Mortgage Insurance

Fund, which is to be used by the Administrator as a revolving fund for carrying out the provisions of this title. This amount is credited to the general reinsurance account.

The insurance premium charge shall be fully adequate to take care of risk ordinarily involved in mortgages of this type and hence should be eventually returned in part for the benefit of the mortgagor. Whenever the credit balance in any group account exceeds the remaining unpaid principal of the then outstanding mortgages assigned to such group by an amount equal to ten per centum of the total premium payments theretofore credited to such account, the Administrator shall terminate the insurance as to that group of mortgages by paying off the mortgages in good standing for the benefit of the mortgagors and by transferring the remainder of such account, if any, to the general reinsurance account. Thus, the insurance premium charge is itself in the nature of a contingent amortization payment. The period of amortization is directly related to and dependent upon the insurance fund of any group of insured mortgages. If the insurance fund of a particular group suffers small or no loss, the mortgages in that group will be paid off in full sooner than those in a group where the insurance fund has suffered heavier losses. The length of payment will depend upon the extent of the general losses sustained by the insurance reserve.

With the exception of the conditions named, the usual relations exist between the borrower and the lender. If the mortgage becomes delinquent and the mortgagee elects to realize on his insurance, he must foreclose or otherwise acquire possession of the property and turn it over to the Administrator. Upon the prompt conveyance to the Administrator of title to such property satisfactory to him and the assignment to him of all claims of the mortgagee against the mortgagor arising out of the mortgage transaction or foreclosure proceeding, the mortgagee shall receive the benefits of the insurance. Upon such conveyance, the Administrator delivers to the mortgagee two things: First, debentures having a face value equal to the unpaid principal of the mortgage on the date of delivery of the property plus all payments which have been made by the mortgagee for taxes and insurance on the mortgaged property. These debentures will bear interest at three per centum per annum, payable semi-annually on the first day of January and the first day of July of each year and shall mature three years after the first day of July following the maturity date of the mortgage in exchange for which they were issued. Such debentures shall be a liability of the mutual insurance fund except that debentures issued in exchange for mortgages which are insured prior to July 1, 1937 shall be fully guaranteed as to principal and interest by the United States. All such debentures shall be subject only to such

federal, state, and local taxes as the mortgages in exchange for which they are issued would be subject to in the hands of the holders of the debentures.

The second thing which the Administrator delivers to the mortgagee in exchange for the property is a certificate of claim. This certificate of claim shall be in an amount sufficient, when added to the debentures given in exchange for the property, to equal the amount which the mortgagee would have received if at the time of the conveyance to the Administrator of the property the mortgagor had redeemed it and paid in full all obligations of the mortgage and those arising out of the foreclosure proceedings. This claim is to provide for the necessary expenses of foreclosure, attorney's fees and unpaid interest. Such certificate of claim calls for an increment at three per centum per annum. If the net amount realized from the property conveyed to the Administrator exceeds the amount of the debentures issued in exchange for the property plus interest thereon and all expenses of handling such property, such amount shall be paid to the mortgagee on his certificate of claim. If there is any excess after this payment, it shall be turned back to the mortgagor.

To this extent the procedure is unique. Heretofore when property was foreclosed, the mortgagor lost all right thereto but in this case he holds a claim to a contingency, and if the property foreclosed should bring more than the indebtedness and expenses, the surplus goes back to him.

Typical home building in this country has been financed with first and second mortgages. The second mortgage attracted speculative risks and carried high interest rates and charges, which sometimes ranged to almost exorbitant figures. This system meant plenty of second mortgage money when conditions were good and almost no second mortgage money when conditions were reversed. Thus, if at the present time first mortgage money were available, construction would still be hindered because of the absence of second mortgage money. Because of the mutual insurance feature offered by the Federal Housing Administration, it will be safe for one lender to make the entire mortgage financing in one investment and thus avoid the dangerous risk of second mortgage financing. Second mortgages are likewise unsound in the long run since the additional burden of the second mortgage seriously impairs the mortgagor's ability to meet his first mortgage obligations.

The short term first mortgage at forty to sixty per centum of the appraised value of the property was at one time thought to be the best mortgage instrument to the conservative lender. However, since this type of mortgage depends for its liquidity upon the possibility of being refinanced at maturity, it consequently brings about grief in time of loss

of confidence and disruption of the money market such as have characterized the past few years. When the mortgage market began to break, many borrowers found that they had been invited and encouraged to incur a debt which was easy for them to bear in good times but which proved too difficult for them to bear in bad times. Short term mortgages which had been renewed from time to time as they expired, suddenly became not as secure as they were thought to be. From the standpoint of the home owner and wage earner, a debt incurred to obtain things for current use is unsound if it cannot be repaid periodically out of current income.

It is believed that amortized mortgages running to complete liquidation and eliminating the need of costly second mortgage financing are socially and financially desirable for both borrower and lender. This system proceeds upon the theory that the safest type of mortgage instrument to the borrower is also, in the long run, the safest to the lender. The plan is to have monthly payments by the mortgagor within his reasonable ability to pay which will completely take care of his entire obligation, including interest, principal payments, mutual insurance premiums, fire insurance premiums and taxes. Amortization charges will be fixed at such an amount so that the mortgage will be completely paid off at its maturity. The periodic payments will be, as near as practicable the same. Thus the mortgagor will know definitely what obligations he will be required to meet. Refinancing charges and second mortgage financing are eliminated. At the same time, because of the insurance feature, the borrower should be able to obtain lower interest rates from his mortgagee.

There are also benefits to be obtained from this plan which flow to the mortgagee. The benefits to the mortgagor, with the increased chances that he will be able to meet his mortgage debt obligation, present an immeasurable benefit to the mortgagee, who is in the business of lending money for a fair return and who does not desire to be forced to realize upon his security.

The Act expressly provides for such statistical and economic surveys and studies as the Administrator may deem to be useful to guide the development of housing and the creation of a sound mortgage market. The results of these surveys and studies will be published from time to time. The gathering and dissemination of information to guide the mortgage market will be one of the functions of the Federal Housing Administration. The gathering of such data involves an expense which is prohibitive to an individual mortgage lender. The National Housing Act places the duty upon the Federal Housing Administrator to provide for necessary research.

The establishment of a national system of scientific real estate appraisal will be of great benefit to lenders, and in turn, to borrowers. Such appraisal is important to the home owner as well as to the mortgage lender. The property owner suffers by investing his savings in a home which declines in value over a period of years to an extent that a material portion of his savings, which the home owner has invested in it, are wiped out. The question of appraisal of residential property has been a source of worry to mortgage lenders for years.

In still another way the mutual mortgage insurance system offers an important benefit to mortgage lenders. Housing of today is little ahead of housing of a decade or two ago. It would be hazardous to attempt a prophesy of what the development might be in the near future. It may be that homes of much less cost will not only compare favorably but will also be superior to the more costly homes of today. This would result in a tremendous decline in the value of existing homes. The possibility of this cost of obsolescence cannot be ignored. From such a possibility, mortgagees find protection in the mutual mortgage insurance system.

The insurance feature itself is, of course, one of the greatest benefits to the mortgagee. However, the real far-sighted lenders doing business in hundreds of millions of dollars will see an immense benefit in mortgage insurance because of the effect of its operation on the mortgage market as a whole. In spite of their size, there are conditions with which no single lending institution may successfully deal. These conditions can only be handled by unified action. Financial institutions are sometimes subject to demands which make it necessary for them to dispose of properties that they have acquired through foreclosures as rapidly as possible. Because of the way in which the mutual insurance plan is set up, it is not necessary for the Administrator to immediately dispose of properties acquired by him in such a way as to cause a panic in the real estate market. He would be able, because of the size of his operations, to carry them and thus prevent the disastrous effect which their forced sale would have upon the value of other property. The Administrator may sell or hold properties as the mortgage market demands. The entire system thus stands as a bulwark to prevent a panic in the real estate market with all its disastrous effects.

Title II also makes provision for the insurance of low-cost housing projects which are held by federal or state instrumentalities, private limited dividend corporations or municipal corporate instrumentalities of one or more states which are regulated by the Administrator. These projects, because of their nature, will be passed upon in each instance by the central organization in Washington. The insurance with respect to any low-cost housing project is limited to $10,000,000.

The Interstate Commerce Act, as amended, is amended in Title V of the National Housing Act so as to give authority to the Commission to allow carriers to give reduced rates for transportation of commodities with the object of improving nation-wide housing standards and providing employment and stimulating industry.

The Act also contains penal provisions for criminal violations in connection with the administration thereof.

TITLE III—NATIONAL MORTGAGE ASSOCIATIONS

The next step in introducing sound practices in the mortgage market is to further the element of liquidity. Mortgages on homes are in small amounts and preferably should be originated by local institutions thoroughly familiar with local conditions and with the responsibility of the borrowers. Local lending institutions, however, should have some outlet for such mortgages.

Title III of the National Housing Act provides for the organization of nationally incorporated, privately owned, national mortgage associations. The incorporators must be five or more natural persons. The Administrator is authorized to issue a certificate of approval to the incorporators after they have complied with such regulations as he may require. Upon the issuance of such certificate, the association becomes a body corporate with the name set forth in the certificate. Each such association shall have a capital stock of a par value of not less than $5,000,000. The Administrator may not authorize an association to commence business until he is satisfied that such capital stock has been subscribed for at not less than par and paid in full in cash or government securities.

The associations are authorized by the Act to purchase and sell first mortgages which do not exceed eighty per centum of the appraised value of property as of the date the mortgage is purchased and to borrow money for such purposes through the issuance of notes, bonds, debentures or other obligations. A national mortgage association is authorized to issue and have outstanding at any time such notes, bonds, or debentures in an aggregate amount not to exceed (1) ten times the aggregate par value of its outstanding capital stock, and in no event to exceed (2) the current face value of mortgages held by it and insured under the Federal Housing Administration, plus the amount of its cash on hand and on deposit and the amount of its investments in bonds or obligations of or guaranteed as to principal and interest by the United States. The only way in which national mortgage associations may borrow money is through the issuance of such notes, bonds or debentures, and these may not be

issued except with the approval of the Administrator and under such regulations as he shall prescribe. Each national mortgage association created shall have succession from the date of its organization unless it is dissolved by act of its stockholders, or its franchise becomes forfeited by act of the Administrator or it is dissolved by act of Congress. It is given power to adopt and use a corporate seal, to make contracts, sue and be sued, and do all the things necessary and incidental to the proper management of its affairs. They are authorized to conduct their business in any state of the United States and in the District of Columbia. An association is deemed a citizen of the state in which its principal office is located.

The Administrator is given power to provide by rules and regulations for the periodic examination of the affairs of national mortgage associations and has power to terminate the existence of any association he finds is violating any of the provisions of the National Housing Act or any rule promulgated thereunder. He is given power to provide for the liquidation, reorganization, consolidation or merger of national mortgage associations. National mortgage associations are subject to taxation to the same but no greater extent as state chartered corporations. When designated by the Secretary of the Treasury, a national mortgage association shall be a depositary of public money and may also be employed as a financial agent of the government. The Act carries a penal provision for the infringement of the use of the words "National Mortgage Association" or any combination of such words.

National mortgage associations will be large institutions and, therefore, sufficiently limited in number to be subject to careful individual supervision. By being able to operate throughout the country, they can channel surplus funds where investors are willing to take low interest rates into fields where those funds are needed. One of their chief purposes will be to obtain funds where mortgage money is superabundant and, in turn, bring these funds to supplement local capital in regions where the rates are high and there is a deficiency of mortgage money. There is a large proportionate demand for money in rapidly growing communities and the local supply of savings is not usually suffcient to take care of it. They will raise funds by selling their debentures in low interest rate areas and will channel these funds into mortgage markets by buying insured mortgages from local lending institutions where new funds are needed, thus releasing fresh funds for local investment. In so doing, they will furnish liquidity to the mortgages held by banks and other lending institutions and will enable such institutions to participate more freely in the mortgage business and in the satisfactory handling of the national mortgage problem. The effect of the operation of these

associations will be to unlock the jams that are customary to the mortgage market.

Debentures of national mortgage associations will furnish a short or long term safe investment for individuals, trust funds of commercial banks and surplus funds of mutual savings banks. Mortgage loans are generally made by local institutions and the rates reflect whether there is a plethora or a deficiency of funds in the local mortgage field. The East usually has large savings per capita. A surplus of funds is available for investment in mortgages frequently in excess of the sound local use for mortgage money. The debentures of national mortgage associations will offer safe and sound investments for these funds. Their size will justify the listing of their debentures on the security exchanges, thus providing the investor with marketability of his security. Their operations will receive constant scrutiny by the financial press and investment services.

The business of mortgage lending is essentially private. It is one which can and should be carried on by private institutions with private funds and by private initiative for the greatest common good. However, the business of encouraging the adoption of a sound mortgage practice is one in which the government may safely and rightly engage. Putting a secure foundation under the home mortgage market through the assistance of a governmental agency which will withstand the severest storms of depression is the object of Titles II and III of the National Housing Act.

ILLEGAL CONSIDERATIONS IN NEGOTIABLE INSTRUMENTS

VARDAMAN S. DUNN

The purpose of this article is to present a constructive criticism of a somewhat singular development in the law of negotiable instruments. The case is this:

A negotiable promissory note, complete and regular upon its face, with the usual unconditional promise to pay and the recitation of "value received," is executed and delivered to the payee. Although there is no indication or suspicion of it upon the face of the instrument, the consideration for its execution is a transaction which the law denounces as illegal. This paper finds its way by negotiation into the hands of a holder in due course, that is to say, one who has paid value without notice of the latent infirmity.

This hypothetical case presents the question, whether, in an action upon the instrument, the maker may set up the fact of illegality in the consideration as a defense against the plaintiff who is a holder in due course? The question is generally stated without reference to the particular type of illegality upon which the instrument is based. Almost universally the answer has been that:

First: As a general rule, illegality of consideration is not available as a defense against a holder in due course.[1] Say the courts, moreover, the general rule applies regardless of whether the transaction giving rise to the instrument is *malum in se* or *malum prohibitum*.[2] The argument that the transaction is *contra bonos mores* and against public policy is unavailing,[3] for the instrument creates an estoppel.[4]

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[1]Stated in Elkin Henson Grain Co. v. White, 134 Miss. 203, 98 So. 531 (1924). See Farmers' State Bk. of Texhoma, Oklahoma v. Clayton Nat. Bk., 31 N. M. 344, 245 Pac. 543, 46 A. L. R. 952 (1926). 3 WILLISTON ON CONTRACTS, § 1676, n. 51. 8 C. J. 766, § 1032.

[2]Union Trust Co. v. Preston Nat. Bk. of Detroit, 136 Mich. 460 99 N. W. 399, 112 Am. St. Rep. 370, 4 Am. Cas. 347 (1904) For Mississippi cases see post n. 27.

[3]3 R. C. L. 1016, § 224: "It is well settled by the authorities that, no matter how illegal or immoral the consideration of a note or bill, it is valid in the hands of a bona fide holder for value, unless some statute makes the instrument absolutely void." See Gurdin v. Bank of Forest,——Miss.——, 154 So. 341 (1934), sustaining the right of an innocent holder of a negotiable note executed upon Sunday against the prohibition of statute but dated upon a secular day, and overruling by necessary implication Mitchell v. Campbell, 111 Miss. 806, 72 So. 231 (1916), holding note based upon illegal and immoral consideration

Second: There is, however, a recognized exception to the general rule. This exception is found to occur where there exists a statute which, expressly or by necessary application, declares the securities based upon some particular transaction *void*.[5] It is said to justify this exception that public policy has been declared by the Legislature, and, again, that an instrument declared void by statute can acquire no validity by its transfer in the channels of trade to an innocent party for value. The adoption of the Negotiable Instrument Law fails to disenthrone this rule although it be passed subsequent to the former statute declaring the instrument void.

Third: But there is yet an exception, so to speak, to the exception. Though the security be void by statute, the maker may not be heard to say as much by way of defense where he has, subsequent to the execution and prior to the negotiation of the instrument,[6] assured the prospective purchaser, by writing or otherwise, that it is valid and that he has no defense. If the purchaser relies upon this in taking the instrument, the doctrine of estoppel is invoked in his favor.[7]

In the absence of this supplementary assurance of validity the exception to the general rule stands unbowed, and the innocent holder is informed, greatly to his surprise and consternation, that he must finance the illegal transaction, and, as the case may be, pay the maker's gambling losses or sustain the expenses of a case of intoxicating liquors. Of course he may pursue his indorser, for the rule is that the indorsement of a negotiable instrument is a separate and distinct contract and is in no

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void even in the hands of an innocent holder for value without notice of the infirmity.

[4]8 C. J. 720, § 1007: "There is little, if anything, relating to estoppel to set up defenses to a bill or note which is not merely an application of the general rules of estoppel and governed thereby. The principle of estoppel either by deed or in pais, as applied to negotiable paper, being intended to give credit and circulation to such security and to protect the honest holder thereof." Currie-McGraw Co. v. Friedman, 135 Miss. 701, 100 So. 273 (1924).

[5]Lucas v. Waul, 20 Miss. 157 (1849). Ayer v. Younker, 10 Colo. App. 27, 50 Pac. 218 (1897), decided before the passage of the N. I. L. Elkin Henson Grain Co. v. White, *supra,* n. 1. Skinner Mfg. Co. v. Deposit Guaranty Bk., 160 Miss. 815, 133 So. 660 (1931). McCormick v. Fallier, 223 Ala. 80, 134 So. 471, 474 (1931). Levy v. Doerhoefer's Ex'r, 188 Ky. 413, 222 S. W. 515, 11 A. L. R. 207 (1920). Note (1920) 30 YALE L. J. 191. Fisher v. Brehm, 100 N. J. Law 341, 126 Atl. 444, 37 A. L. R. 695 (1924). Sabine v. Paine, 223 N. Y. 401, 119 N. E. 849, 5 A. L. R. 1444 (1918). Note (1918) 28 YALE L. J. 85. See also, 3 WILLISTON, *op. cit.,* § 1677. BRANNAN, NEGOTIABLE INSTRUMENTS LAW (5th Ed.) 556, 557, § 55.

[6]Hill v. Thixton, 94 Ky. 96, 23 S. W. 947 (1893), that an assurance of the validity of a note executed simultaneously therewith amounts simply to a repetition of the announcement of the notes themselves.

[7]Dayhood v. Neely, 135 Miss. 14, 99 So. 440 (1924), *post* n. 26. Holzbog v. Bakrow, 156 Ky. 161, 160 S. W. 792, 50 L. R. A. (N. S.) 1023 (1913). See also, 8 C. J. 768, § 1033. 21 C. J. 1143, § 146.

manner inflicted with the plague of an original violation of law.[8] But, as a matter of fact, the plaintiff must often be disappointed in this, for his indorser may be financially irresponsible, and it is often the case that in purchasing the instrument the financial stability of the maker alone is relied upon.[9]

The law as stated is practically uniform among the states especially with regard to those having statutes declaring securities void when executed for gaming debts. Should these statutes apply so as to defeat the action of a holder in due course against the maker? Some few states have settled the question in the legislative bodies by either declaring expressly that such notes and securities are void even in the hands of innocent holders or the reverse of this. In most states, however, as in Mississippi, the statute merely declares the securities *void,*[10] and the rights of innocent holders are left to judicial determination. Consistently, but, it is submitted, illogically the courts have decided against the innocent holder.

JUDICIAL INTERPRETATION—"VOID"

Judicial interpretation is a power practically without limit. A general rule of construction is announced in *Smith* v. *Chickasaw County*:[11] "In construing a statute, not only the language, but the purpose and

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[8]The innocent indorsee may recovery against his indorser, for the indorsement is a separate and distinct contract: Wachovia Bank & Trust Co. v. Crafton, 181 N. C. 404, 107 So. 316, 16 A. L. R. 1375 (1921). Irwin v. Marquett, 26 Ind. App. 383, 59 N. E. 38, 84 A. S. R. 297 (1901) 3 R. C. L. 1020, § 227.

[9]It is also of interest to note that the maker's defense of illegality under the statute is not limited to instances where that infirmity attaches at the inception of the transaction, but he may successfully defend where the original consideration was perfectly legitimate and valid, but where the payee or some subsequent party to the instrument indorsed it for a gaming consideration. Skinner Mfg. Co. v. Deposit Guaranty Bk, *supra,* n. 5.

Whether this term of the law would subject him to double liability in the event that he payed the instrument in ignorance of its infirmity is an open question at least in Mississippi, but it would seem to logically follow from the theory of the cases that where the maker has paid the instrument without notice of the infirmity, he could be required to pay the amount of the note again to the losing party in the gaming transaction. He stands in no better position than an innocent indorsee where the instrument had its inception in a transaction declared void by statute. He has paid a void thing upon which he was not liable.

[10]The Mississippi statute with regard to securities founded upon gaming transactions is typical: "Contracts, judgments, securities, conveyances . . . executed, when the whole or any part of the consideration . . . thereof shall be for . . . any valuable thing won, lost, or bet" in gaming "shall be utterly void" MISS. CODE ANN. 1930, § 1824.

By MISS. CODE ANN. 1930, § 1826: the loser in a gaming transaction may sue and recover money or property lost.

Similar to the gaming statute is that which provides: "If any person shall trust or give credit to another for intoxicating liquors, he shall lose the debt, and he is forever disabled from recovering the same or any part thereof; and all notes or securities given therefor, under whatever pretense, shall be void." MISS. CODE ANN. 1930, § 1824.

[11]156 Miss. 171, 125 So. 96 (1929).

policy, which the Legislature had in view, must be considered. The court in construing a statute, will give effect to such purpose and policy, though the interpretation may go beyond, or come within, the mere letter of the statute."

The word "void" when employed in legislative enactments has no perspicuous connotation. The predicate of ambiguity is thus found to exist from which emanates the duty and a great portion of the judicial authority to interpret, and pursuant thereto the court undertakes to ascertain the "purpose and policy which the legislature had in view." In arriving at this conclusion, that meaning of the language is sought which comports with the court's conception of what best subserves the public interest. The controlling query becomes: Which interpretation will accord with justice and policy?

As a general rule "void" when used in a statute does not mean void at all, but what the legislature really intended to say was "voidable."[12] The liberal rather than the technical construction is adopted as a general rule, because to hold otherwise would effect an injustice, and the presumption is that this was not the purpose of the Legislature in creating the statute.

All of which is simply by way of pointing out that the appearance of the word "void" in those statutes declaring securities void when based upon some designated illegal transaction, standing alone, has no controlling significance in the sense of rendering the conclusion that has been reached necessary or unavoidable. Its presence in the statute renders the conclusion that the securities are ineffectual in the hands of innocent holders possible but not imperative.

That the use of the word alone has no imperative force is, in truth, tacitly admitted by the decisions. The public policy behind the word and not the word itself is that which determines the issue. Since this is of such paramount importance, let us next consider this policy:

THE PUBLIC POLICY FALLACY

By way of illustration, the plaintiff has purchased a negotiable note for value by indorsement. The consideration in the inception of the instrument was a sum of money lost in some gaming transaction, but

[12]See WORDS AND PHRASES (2nd. & 3rd. Series), "Void." Ewell v. Daggs, 108 U. S. 148, 27 L. Ed. 682, 2 S. Ct. 408 (1883): The defendant urged in this case that no subsequent law could make valid a "void" instrument. In refuting this argument the Supreme Court said: "It is quite true that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be 'void and of no effect.' But these words are often used in statutes . . . in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances."

the plaintiff had no notice of this nor was he ever given the slightest reason for doubting the validity of the note. Recovery is denied him, and it is not unusual to find the court saying this: "It has been the policy of this state to suppress gaming, and the statutes making gaming contracts void are founded upon what the legislature has for many years deemed sound public policy. . . . In our opinion, the disappointment now and then of an innocent holder of a negotiable instrument would not be as hurtful and injurious to the best interests of the state as the removal of the ban from gaming."[13] The Mississippi court has used language to the same effect.[14]

In other words, public policy demands the suppression or discouragement of the particular act embraced within the statute. This, indeed, is incontrovertible, but the announcement is given artificial weight; for to say that any other conclusion concerning the rights of the parties involved would result in lifting the ban from gaming is a decided non sequitur.

Mr. Williston has said: "As a matter of policy the propriety of protecting one who has lost at gaming at the expense of an innocent purchaser for value of what has been lost, may well be questioned."[15] And so it may, but added to this are other considerations so momentus that the equity of the innocent party, though of imposing significance, may be considered incidental. There is the policy of the Law Merchant to be considered. As adequately expressed by the New York court: "Every restriction upon the circulation of negotiable paper is an injury to the state, for it tends to derange trade and hinder the transaction of business."[16]

Although the vital importance of these matters to the public welfare is affirmed over and again, their just significance has failed to impress the courts. They have been lightly brushed aside, it would seem, with wholly unconvincing arguments. The only answer given to the policy of the Law Merchant is simply to say that the statute constitutes an exception. When confronted with the equity of the innocent holder from a standpoint of general considerations of equity the answer is that the statute declaring the securities void was not passed out of any regard for the parties immediately concerned, but rather for the interest of the public.[17] But this begs the question. The statute was passed for the interest of the public, to be sure, but wherein does the public interest lie?

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[13]The quotation is taken from Geo. Alexander & Co. v. Hazelrigg, 123 Ky. 677, 97 S. W. 353 (1906).

[14]See Elkin Henson Grain Co. v. White, *supra*, n. 1.

[15]3 WILLISTON, *op. cit.*, § 1677.

[16]Chemical Nat. Bk. v. Kellog, 183 N. Y. 92, 75 N. E. 1103, 111 Am. St. Rep. 717, 2 L. R. A. (N. S.) 299, 5 Am. & Eng. Ann. Cas. 158 (1905).

[17]See Ayer v. Younker, *supra*, n. 5.

It is no answer that instances of this nature are likely to occur infrequently; that fact weighs as heavily upon the one side as the other. If that fact is to be given any controlling weight, it must weaken rather than justify the position which the courts have taken. If the occurrence is infrequent, the denial of recovery can have but scant tendency to suppress the denounced transaction. Upon the other hand, though infrequent, it must yet have a strong tendency to surround negotiable paper with that suspicion which it is the avowed policy of the law to avoid. The injustice to the holder in due course may be only occasional, but the resulting hardship is none the less acute, and to assert that an injustice is justifiable because it does not occur as often as it might is to commit oneself to an absurdity.

To allow recovery by an innocent holder of a negotiable instrument is not, to lift the ban from the illegal act. Moreover, from a practical standpoint, the denial of recovery can have little, if any, tendency to suppress, for example, gambling; whereas the circumstances open wide the doors to fraud, collusion and perjury. Here is an example which might easily occur:

A. is financially responsible but none too sound morally. B. is financially irresponsible and not above a bit of trickery where the opportunity suggests itself as a profitable one. A. executes a negotiable promissory note to B. pursuant to a conspiracy between them whereby B. will indorse the note to a third party. They agree that A. shall defend the payment of the instrument upon the ground that it was won from him by B. in a gaming transaction. B., of course, sustains him in his story. Who is there to gainsay it? Here, at one and the same time, is collusion, fraud and perjury.

Upon the other hand, the innocent indorsee is not without temptation. The law says to him: "You need only establish that you purchased the note upon the oral assurance of the maker that it was valid, and an estoppel is worked in your favor."[18] Here is a strong temptation to commit perjury, and under the circumstances it is almost justified.

In summing up the arguments for and against the rule which denies recovery to the holder in due course from a standpoint of public policy, it is:

First: A benefit. It may be conceded that such a holding may have some tendency to suppress the denounced act, and to that extent it is a benefit to the public. But the tendency is small, and to say that the result would be to lift the ban from the illegal act is a non-sequitur.

Second: A detriment. The detriment which must result from such

[18]See Dayhood v. Neely, *supra,* n. 7.

a rule is great; it may be briefly enumerated as follows: (a) It throws suspicion upon commercial paper and so tends to derange trade. (b) It is contrary to the decided policy of the Law Merchant. (c) It results in hardship and individual injustice which it is the purpose of all law to avoid. (d) It opens wide the doors to collusion, fraud and perjury. (e) It accomplishes a certain fraud upon the public arising from the sole fact of the defendant's executing the instrument calculated to mislead the innocent to his detriment.

STATUTES v. THE N. I. L.

The Negotiable Instruments Law, although enacted subsequent to the passage of those statutes declaring securities void when given in consideration of particular illegal transactions, does not repeal the prior statute or statutes, as the case may be.[19] The courts in passing upon the rights of innocent holders have too often allowed this argument to becloud the true issue. The error does not lie in holding that the one statute does not overrule the other, but rather in assuming them to be in conflict. Here is just an example of the erroneous reasoning adopted:

The question was presented to the Mississippi Court in *Elkin Henson Grain Co.* v. *White, supra.* The intoxicating liquor statute was involved, and it was argued that the enactment of the N. I. L. overruled the prior statute. The court said: "The statute making all notes and securities for purchase price of intoxicating liquors void is founded upon what the Legislature for many years deemed to be sound public policy, and we do not think it was the intention to legalize such debts by the passage of the Negotiable Instruments Act."

That this was not the intention of the subsequent enactment is perfectly manifest. Its purpose was to establish uniformity in the common law of negotiable instruments. Those sections which have been urged as repealing the prior statutes declaring securities void in certain instances are no more than the codification of a principle of estoppel that had grown up around commercial paper long before the Uniform Negotiable Instruments Act was even thought of. This estoppel had long been applied in a great majority of the states of this country. Equities existing between the original parties to the instruments were cut off by negotiation to innocent purchasers for value without notice thereof.[20]

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[19]BRANNAN, *op. cit.,* 556, 557, § 55. Elkin Henson Grain Co. v. White, *supra,* n. 1. Skinner Mfg. Co. v. Deposit Guaranty Bk., *supra,* n. 5. *Contra*: Wirt v. Stubblefield, 17 App. D. C. 283 (1900). Wood v. Babbitt, 149 Fed. 818 (1907). Sakon v. Santini, 257 Mich. 91, 241 N. W. 160 (1932).

[20]See Lynchburg Nat. Bk. v. Scott Brothers, 91 Va. 652, 22 S. E. 487, 29 L. R. A. 827, 50 Am. St. Rep. 860 (1895).

ESTOPPEL

Few decisions, it would seem, have seriously considered the question from the standpoint of estoppel where no facts *dehors* the instrument itself presented themselves, but even where this theory of the case was urged, the representation contained upon the face of the note itself were held not sufficient to create an estoppel.

That a negotiable instrument bears an estoppel upon its face is beyond doubt. The nature of that estoppel is aptly expressed in *Ayer* v. *Younker.* [21] The court said: "In the case at bar, the defendant executed a negotiable promissory note, perfect upon its face, and with nothing in its contents to indicate in the slightest degree any taint of illegality or invalidity. He said thereby that he was legally bound to pay the sum of money specified to whosoever should be the lawful holder of the note at maturity, without any offset or claim of defense."

Strangely enough, however, the majority opinion continued to deny recovery under the defense that the note was executed for a gaming debt. Said the court: "At the instant, however, of the execution of the note, the statute applied, and declared it to be utterly void and of no effect, whether in the hands of an innocent purchaser for value or otherwise." In *Lucas* v. *Waul*[22] the Mississippi court said: "The statute places a taint upon the indebtedness that nothing can purify." In *Claflin* v. *Boorum,*[23] the New York court used language which has since become almost trite: "that which the statute has declared void cannot be made valid by passing through the channels of trade." But obviously these statements are but legal conclusions from a legal fiction emanating from the term "void."

Why, in the name of all that is reasonable, should not the negotiable instrument, standing alone, suffice to preclude the defense as against one who has relied upon the validity thereof in becoming the holder of the instrument? True, the note is void, and the legal fiction has it that in contemplation of law it is a *no-thing,* but the fact remains that the paper circulates as an actuality, and so long as it is an actuality and continues to occupy space, it speaks an estoppel, a stronger case of which is difficult to conceive.

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[21] *Supra,* n. 5. For similar expressions see Hill v. Thixton, *supra,* n. 6, in this case the maker of the negotiable instrument executed simultaneously therewith a certificate that the note was valid, a bona fide debt, and that there existed no offset, or discount, counterclaim or defense. The court said: "In the certificate we have that which is but the extended meaning of the note: 'Bona fide debt against me.' Certainly the note distinctly imports as much: 'No offset, or discount, counterclaim, or defense.' Of course not. Says the note, by clear implication: 'The same is good against me, and will be paid at maturity'." To the same effect, see Dow v. Higgins, 72 Ill. App. 302 (1897).

[22] *Supra,* n. 5.

[23] 122 N. Y. 385, 25 N. E. 360 (1890); quoted with approval in Sabine v. Paine, *supra,* n. 5. Fisher v. Brehm, *supra,* n. 5.

In *Chemical Nat. Bk. of New York* v. *Kellog*,[24] the New York court said: "Commercial necessity requires that only slight evidence should be insisted upon to establish an estoppel in pais as to the validity of commercial paper. The only practicable rule is to make the face of the paper itself, when free from suspicion, sufficient evidence, against all who aided to put it into circulation in that condition."

The instrument is declared void, but it is not such a nullity that it is incapable of sustaining a right grounded upon estoppel; this is affirmed in *Dayhood* v. *Neely*[25] in which case a void instrument was made effectual to sustain an action where the maker, subsequent to the making of the note, orally assured the prospective indorsee that the instrument was valid.

The logic of the dissenting opinion in *Ayer* v. *Younker, supra,* is unimpeachable. Thompson, P. J., in that opinion said: "I find myself unable to accept the conclusion reached in this case by the majority of the court. I agree with them that the evidence showed that the consideration in suit was a gambling debt, and I also agree that such a note is absolutely void, even in the hands of an innocent purchaser for value, before maturity. *But to my mind the decision of this case does not turn upon any question affecting the validity of the note. The question is whether to the extent of the money borrowed upon it, the defendant can be heard to say that it is void. . . .* After being the cause of the plaintiffs' investing their money in his paper, *to permit him to say, as against them, that its consideration was illegal, would be to assist him in the consummation of a fraud.*" Continuing, the justice said: "The note being void originally, its transfer to the plaintiff did not impart vitality to it, but . . . the defendant should be adjudged estopped to deny its validity."

ESTOPPEL DEHORS THE NOTE

To hold that the note within the purview of the statute is so utterly devoid of life that it is incapable of sustaining an action no matter what its subsequent history may be, would be harsh, but it would at least be consistent with the theory adopted. But we are not even allowed the blessing of consistency. The Mississippi court refuses to consider the note, standing alone, sufficient to constitute an estoppel. The reason, previously pointed out, is the public interest of the state in the suppression of the particular transaction embraced within the terms of the statute. It is said that the statute was not passed out of regard for the parties immediately concerned in the particular transaction, but the public had

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[24]*Supra,* n. 16.

[25]*Supra,* n. 7. See also other cases cited in that note.

an interest. But under the doctrine of *Dayhood* v. *Neely, supra,*[26] the maker may estop himself from asserting the invalidity of the note, by declarations *dehors* the instrument. What, may I ask, has become of the interest of the state in the suppression of the illegal transaction? In view of *Dayhood* v. *Neely,* the reason assigned for disallowing an estoppel from the face of the note looses its last vestige of logic.

The very most that can be said of this subsequent assurance of validity is that it strengthens the grounds for the estoppel present upon the face of the note. But even this is questionable, for such a course of conduct upon the part of the prospective purchaser in seeking additional assurance that the note is valid may well be taken to suggest that he is suspicious of the validity of the note and so tend to weaken rather than strengthen his position as an innocent holder.

If, indeed, anything further is in order upon this point, it is observed that to allow an oral assurance of the validity of a negotiable instrument to create an estoppel, as was the case of *Dayhood v. Neely,* and disallow the effect of the instrument in this respect is virtually to prefer parole over written evidence with its resulting temptation and opportunity for fraud and perjury.

AN ANOMALY IN THE LAW

The law has it that a negotiable instrument may be based on an illegal or immoral consideration or executed in violation of a positive statutory prohibition, and yet be enforceable when held by an innocent purchaser.[27] A different conclusion was reached in *Mitchell* v. *Campbell.*[28]

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[26]*Supra,* n. 7. "Where the maker of a note promises a prospective purchaser to pay the same, or represents to him that the note is valid and there is no defense thereto, he is estopped to resist payment in an action by such purchaser, who has taken the note in reliance on such representations, and he will be precluded from setting up as a defense that the consideration of the note was a gambling debt and therefore illegal."

[27]The development of the law upon this point may be traced in the cases. In Mississippi, contracts executed upon Sunday and contracts tainted with usury are prohibited by statute, but the contracts are not declared void by statute. In two early Mississippi cases, Miller v. Lynch, 38 Miss. 344 (1860) and Kountz v. Price & Dickson, 40 Miss. 341 (1866), notes executed upon the sabbath were unreservedly declared to be utterly void. Here, however, the action was by one who took with notice. The question was reopened in Currie-McGraw Co. v. Friedman, *supra,* n. 4, in which case suit was instituted by an innocent holder. The earlier cases were reviewed by the court and considered not controlling because the rights of innocent parties were not there involved. The court found that the defendant was estopped to set up the fact that the notes were illegal because executed upon Sunday, and this for the reason that "to permit this defense would be to allow these defendants to take advantage of their own wrong, to profit by the fact that they had violated the Sunday law; while on the other hand the plaintiff has violated no law and had no knowledge of its violation." Accord: Allen v. Grenada Bank, 155 Miss. 91, 124 So. 69 (1929), note tainted with usury. Riddell v. Tallahatchie Home Bank, 160 Miss. 141, 133 So. 128 (1930). Gurdin v. Bank of Forest, *supra,* n. 3.

[28]*Supra,* n. 3.

This was a suit by an innocent holder upon a note which had been given for rental of a bawdyhouse. There was no statute declaring such notes void. HELD: "The whole contract is against public policy, an offense against morals, and absolutely void," and "if the lease contract in the present case is void ab intitio, the rent notes based thereon are void, and the appellant as indorsee and holder of these notes acquired nothing." There was no intimation that the holder was not one in due course.

But this case, say the court by necessary implication in *Gurdin* v. *Bank of Forest,*[29] is no longer law, for it was decided before the adoption of the Negotiable Instruments Law.

In *City Nat. Bk.* v. *De Baum,*[30] Smith J., in speaking for the Arkansas court observed that: "It appears somewhat anomalous that a note may be based on an illegal or immoral consideration, or executed in violation of a positive statutory prohibition, and yet be enforceable when held by an innocent purchaser, unless there is an express declaration that such contract is void; while, on the other hand, a recovery will be denied, even to an innocent purchaser if there is an express statutory declaration that the contract forming the consideration is void."[31]

It would indeed seem nothing but logical and reasonable to draw an analogy from instruments declared void by legislative enactment, to instruments declared void by the courts as subversive of morals and against public policy, or vice versa.

It has been pointed out that the sole reason assigned for declining recovery upon a note declared void by statute is the public interest to suppress the transaction upon which the note is founded. Conceding, for the sake of argument, the soundness of the position, is it not equally to the public interest to suppress crimes generally?

The reason assigned for allowing a recovery where there is no statute declaring the securities void is estoppel.[32] Here, whatever tendency an opposite holding could have toward the suppression of the denounced act is outweighed by considerations of the public interest which demands that commercial paper exchange with facility, and that the innocent have protection against the depredations of the culpable. There is no good reason why the same rule should not apply alike to notes declared void by statute when based upon some particular illegal act.[33]

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[29]*Supra,* n. 3.

[30]166 Ark. 18, 265 S. W. 648 (1924).

[31]But the court considered itself bound to the "anomaly" by German Bk. v. De Shon, 41 Ark. 331.

[32]Currie-McGraw Co. v. Friedman, *supra,* n. 27. That decision is expressive of the policy of Mississippi with respect to estoppel. There is no good reason why it should not be applied in instances where the negotiable instruments have been declared void by statute. The court said: "Where a party makes and puts in circulation a negotiable note purporting to be made and bearing date on some

A note based upon an illegal or immoral consideration is enforceable in the hands of a holder in due course in the absence of a statute declaring the note void. In the presence of such statute the instrument is, standing alone, unenforceable. The only possible distinction between the two instances, it would seem, is upon the basis of a purely legal fiction growing out of the term "void." But this overlooks the sole justification for the force of fiction, namely, to accomplish justice. When it is opposed to justice, and policy, the fiction loses its right to exist. But even if the courts desire to retain the fiction, in view of the unimpeachable logic of *Ayer* v. *Younker, supra,* it is not inconsistent with allowing recovery to the holder in due course.

PRECEDENT

The decisions sustaining the rule under discussion were championed in a recent note[33] wherein Professor Green, Jr., said: "So many cases adopting this construction have been decided that no other construction should now be considered." The writer advocated the universal adoption of the rule in the name of uniformity in the law of negotiable instruments.

Upon the other hand, it goes without saying that the desire for uniformity and precedent, so called, should not stand in the path of reason, justice and policy.

To quote from a recent United States Supreme Court decision: "One of its (the common law's) oldest maxims was that where the reason of a rule ceased the rule also ceased, and it logically followed that when it occurred to the courts that a particular rule had never been founded upon reason, and that no reason existed in support thereof, that rule likewise ceased."[34]

"Precedent" when opposed to reason, justice and policy is nothing short of a misnomer.

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secular day, he is estopped, as against an innocent holder, from showing that it was actually executed and delivered on Sunday. We cannot well conceive of a stronger case for the application of the doctrine of estoppel than such a case presents." Again: "To permit this defense would be to allow these defendants to take advantage of their own wrong, to profit by the fact that they had violated the Sunday law; while on the other hand the plaintiff has violated no law and had no knowledge of its violation by the defendants. To permit this defense would be to allow the party who alone has been guilty of a breach of the law to set up this illegal act as a defense to a suit by an innocent party." The court continues that "to allow the defendant such a defense would permit him by his own unlawful act to perpetrate a gross fraud upon innocent purchasers, and to such an act the law will not lend its aid or give its sanction."

[33]GREEN JR., *Real Defenses and the Negotiable Instruments Law* (1934) 9 TULANE L. REV. 78, 85.

[34]Funk v. United States, 290 U. S. 371, 78 L. Ed. 369, 54 S. Ct. 212 (1933). The court in overruling a long line of Federal precedent, adopted the quotation from Ketelsen v. Stilz, 184 Ind. 702, 111 N. E. 423, L. R. A. 1918 D. 303, Ann. Cas. 1918 A, 965 (1916).

THE NEED TO SIMPLIFY THE FORMAL REQUISITES OF CONTRACTS IN MISSISSIPPI BY REVISING THE DOCTRINE OF CONSIDERATION AND THE STATUTE OF FRAUDS

By J. B. Hutton, Jr.*

I
INTRODUCTION
A

The doctrine of consideration and the Statute of Frauds are formal, relating, respectively, to an ancient procedural requirement, and to writing. These rules and their refinements are obsolete, and a radical revision of them is needed.

An outline of the history and present status of these formal requirements is given herein in order to direct the attention of the bar to this need.

The development and persistence of the doctrine of consideration was the result of a requirement of procedure.

The doctrine of consideration was developed under the requirement of assumpsit that there should be detriment to the plaintiff-promisee in order for assumpsit to lie in cases of simple contracts. This requirement existed because assumpsit was a delictual remedy, and a tort, in the nature of a fraud, had to be shown for the action to lie. Resort to this remedy of assumpsit, thus conditioned, was necessary to avoid wager of battle under the action of debt. Assumpsit became the chief remedy for simple contracts, and its influence preserved in England the outworn notion, of Roman origin, that an executory promise is unenforceable, which notion was to persist, but subject to sweeping exceptions and encroachments.[1]

When this doctrine of consideration is contrasted with specialty contracts it is seen that English law enforced agreements based on no consideration where the agreement was expressed in the form of specialties, and from this it is clearer that the requirement of consideration for simple contracts got its life from the requirement of assumpsit. Specialties were recognized several centuries before the doctrine of consideration was developed. The hoary dictum that a seal imports consideration is historically untrue. Specialties were enforceable because the intention of the parties was expressed in a solemn form. The seal was but part of the formality.[2]

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[1] 8 Holdsworth, History of the English Law, c. 1.
[2] 3 Holdsworth, History of the English Law, 418-20.

Assumpsit and the other forms of action have been abolished.

And consideration, an incident of assumpsit, should not remain the indispensable requirement of every contract.

Substantial justice is not advanced by treating consideration as an indispensable element of contracts, for the law does not inquire into the adequacy of the agreed consideration. Fairness and reciprocity, if had at all, must result from the free choice of the parties in arranging and accepting the terms of contracts. Direct remedies for over-reaching and for fraud are available in equity, but the doctrine of consideration is not even indirectly among these remedies, for it does not insure fairness or adequacy.

Freedom to contract is not conserved by the doctrine of consideration, for, with or without the doctrine, the parties are equally free to stipulate what conditions they will as being of the essence of the agreement; but, on the contrary, freedom to contract is often limited by this technical rule which defeats the intention of the parties. Especially is this true in Mississippi, for in Mississippi specialties have been abolished, and no mode of making solemn agreements binding is left, save under the rules of consideration.

B

The Statute of Frauds was enacted at a time when the rules of evidence disqualifying all parties of interest as witnesses made grave difficulties of proof in the ordinary transactions of that age, two and a half centuries ago. As a result, the act, though useful for that remote age, is now obsolete, and is ill adapted to modern business needs. For, parties of interest are now competent as witnesses, and many subjects of controversy which are as important as those enumerated by the act have arisen in modern business and should likewise be evidenced by writing if any subjects whatever are to be evidenced in writing under the requirements of legislative acts. Another result of the enumeration of the principal subjects of litigation of that early age is that in applying the general topics of the act to present business in litigation uncertainty and hardship has resulted in the stretching process. The numerous cases in which the orbit of the act has been treated prove that the act is obscure and difficult of application, whereas a much simpler act would serve.

An examination of legal authorities adds force to the conclusions dictated by common sense that the doctrine of consideration and the Statute of Frauds are outworn in their present form. For this purpose the following passages are set out. The brief review, to follow, of the Mississippi decisions on these subjects illustrate the force of the criticisms made against these formal and anachronistic requirements of simple contracts.

C

SUGGESTIONS FOR THE LAW OF THE FUTURE

Consideration

"The doctrine of consideration has, as we have seen, its strong points. Its weakness is that it is inadequate as the sole test of the validity of simple contracts. The true remedy, therefore, is not to scrap it, but to reduce it to a subordinate place in the English theory of contract. This, it seems to me, could be done, and a great simplification could be made in the English law of contract, if a short act were passed which (1) abolished the differences between simple and specialty contracts; (2) repealed Section four of the Statute of Frauds (except the sections relating to conveyances of land and the Statute of Wills) and Section four of the Sale of Goods Act; (3) and provided that all lawful agreements should be valid contracts, if the parties intended by their agreement to affect their legal relations, and *either* consideration was present, *or* the agreement was put into writing, and signed by all the parties thereto. By making these changes we should get a body of law which would be easy to apply, and would allow a greatly increased freedom of contract. The need for proof that the parties of the contract intended to affect their legal relations would be satisfied; proof of the existence of the contract would be facilitated; and at the same time, full effect could be given to the intention of persons who wish to enter into contractual relations."[3]

"'Any pact whatever', says Professor Lee, speaking of Roman-Dutch law, 'is enforceable provided only that it is freely entered upon by competent persons for an object which is physically possible and legally permissible.' (Lee, *Introduction to Roman Dutch Law,* 197.) And the same description . . . might be given of either the actual state of the law, or the state to which it is approximating in all civilized countries which are not governed by the common law. . ."

"The adoption by the law of this liberal attitude insures the carrying out of the lawful intention of the contracting parties; and if it is right that the law should enforce contracts, there seems no good reason why it should not at the present day adopt this attitude. There seems to be no reason why it should allow itself to be fettered, either by obsolete procedural difficulties or by obsolete technicalities which have been inherited from other legal systems . . . The difficulty of proving the contract . . . and . . . of proving whether or not the parties really intended by their agreement to affect their legal relations . . . may be

[3] 8 HOLDSWORTH, HISTORY OF ENGLISH LAW, 48, citing Lorenzen, *Cause and Consideration in the law of Contracts,* 28 YALE L. J. 621; Walton, 41 L. Q. R. 306; Jazawickreme v. Amarasuriya (1918) A. C., at 875; MARKBY, ELEMENTS OF LAW (3rd ed.) 310-317.

obviated by requiring, as French law requires, all contracts which involve more than a certain sum of money to be in writing; and by requiring, as is done in many countries, that promises to give shall be authenticated by a judge or notary."[4] (Cf. note 5.)

II

THE STATUTE OF FRAUDS

"The prevailing feeling both in the legal and in the commercial world is and has for a long time been, that these clauses (i. e., the fourth and the seventeenth Sections, except as to land, and except the Wills Act) have outlived their usefulness and are quite out of place amid the changed legal and commercial conditions of today."[6]

"The law of contracts is, in most of its departments, admirably rational and equitable, though it exists in a form in which no one can understand it without the labour of years, which bears upon it in every direction traces of the gradual expansion of view and extension of old formulas to meet the new facts which . . . are so troublesome not only to the legal practitioner but also to his clients . . ."

"Of these branches the most luxuriant, and to my mind, by much the most objectionable is the 17th section of the Statute of Frauds, as explained by the vast number of cases which have been decided upon in the last 201 years during which it has been in force. I know of hardly any part of the whole law of England which throws so much light upon the nature and extent of its defects or upon the difficulty of understanding and applying a remedy to them (though in this case the remedy appears to me simple enough) as this particular bit of it. The enacting part of the section in question contains 86 words. In Langdell's *Cases on Sales of Personal Property* are printed no less than 178 cases decided upon its meaning. They fill 619 large and closely printed octavo pages and the great majority of them were decided by English . . . courts. Mr. Benjamin's exposition of the law upon the subject in his admirable work on the *Contract of Sale,* fills 120 pages; and, after using every possible effort to compress the result of the cases into the shortest possible compass, Mr. Pollock and I have found it necessary to expand the 86 words into 14 propositions or articles. . . This formidable body of law applies to every one of probably many thousand contracts made every day in England, Ireland, and the greater part of America, the incalculable ma-

[4] 8 HOLDSWORTH, *op. cit.,* 44; Lorenzen, *op. cit.,* note 3; Art. 341 CIVIL CODE; BELL, PRINCIPLES § 63, 67; 28 YALE L. J. 642-3 citing Italian, French, and German Codes.

[5] POLLOCK, GENIUS OF THE COMMON LAW 90-91.

[6] 6 HOLDSWORTH, *op. cit.* 396, citing LEAKE, PAPERS OF THE JURIDICAL SOCIETY 271; Stephens, 1 L. Q. R. 1; POLLOCK, 29 L. Q. R. 241; Second Report of the Mercantile Law Commissioners 6, cited LEAKE, *op. cit.* 290. n.

jority of which are made in absolute ignorance of its provisions and with no reference to them, whatever."

"The 17th Section of the Statute of Frauds sins against several of what ought to be well-recognized rules of all rational legislation.

"In the first place it establishes a highly artificial rule about a very simple matter.

"In the second place, it is a relic of times when the best evidence on such subjects was excluded on a principle now exploded.

"In the third place, it is, as the multitude of cases decided upon it clearly show, obscure in reference to the subject to which it relates."

"It is obscure in reference to the subject matter to which it relates . . . Where, then, is the obscurity? It lies mainly in the use of four very common expressions: 'contract for the sale of goods', 'goods', 'note or memorandum in writing of the bargain', 'signed'.

"All these phrases . . . are obscure because English law is pre-eminently deficient in clear and authoritative definitions of its fundamental terms."

"Did it ever occur to any ordinary merchant, for instance, that he might, if he were so minded, make by word of mouth a contract for the sale of railway shares worth 100,000 pounds, but that such a contract for a set of false teeth worth 10 pounds 10 shillings would not 'be allowed to be good'? Do railway contractors in general understand that a contract to build a railroad may be made by word of mouth (unless it is to extend over more than a year), whatever amount it involves; but that a contract to make for a company any article costing more than 10 pounds falls within the Statute of Frauds? Can any human being assign any reason whatever why a contract of marine insurance should be allowed to be less formal than a contract for the sale of goods? Can anyone imagine any intelligible reason why the sale of a crop of potatoes should be subject to different rules from the sale of a crop of clover, and why 'questions not yet finally settled' should present themselves on each of these mysterious subjects to so eminent a lawyer as Mr. Benjamin?"

"The problem (of applying this statute thus obscurely drawn to modern business transactions) may be thus stated:

> If the authors of the Statute of Frauds had ever considered the foolish question now before the court, (which it is morally certain they never did) what view are we to guess that they would have taken upon it, our guess being guided by certain artificial rules of construction, the application of which probably vitiates the result arrived at—which result, however, is not of the least importance."

"The special peculiarities of the 17th Section of the Statute of Frauds is that it is in the nature of things impossible that it ever should

have any operation, except that of enabling a man to escape from the discussion whether he has or has not been guilty of a deliberate fraud by breaking his word."

". . . I can only recommend that the 17th Section should be repealed, and the cases upon it be consigned to oblivion."[7]

III
REVIEW OF MISSISSIPPI DECISIONS

A
Consideration

1. The ancient rule of *nudum pactum,* of Roman origin, made all executory promises unenforceable.

In early Latin law "Contracts between private persons under ordinary circumstances founded no claim for legal redress at the hands of the state. The only protection of the creditor was the debtor's word of honor which was held in high esteem after the wont of merchants, and possibly also, in those frequent cases where an oath had been added, the fear of the gods who avenged perjury."[8]

The same rule obtained under later Roman law, but equitable obligations resting on deliberate acts were enforced; and promises under solemn legal form of a stipulation were enforced.[9]

And the same rule obtains in Mississippi (subject to extensive exceptions), making bare promises unenforceable.[10]

2. But mutual executory promises are consideration one for another.[11]

Under this broad exception to the ancient rule, executory promises are enforceable if bi-lateral, and if intended to be consideration, the one for the other. When intention is recognized in a unilateral promise as the basis of a legal obligation, then the old rule will have been completely superseded, and then it may be said that the law enforces executory promises in due form as constituting obligations.

Why this final step should not be taken is difficult to understand. The intent is enforced where bilateral promises are made even though nothing has been done in performance of the agreement. Likewise intent expressed in due form in a unilateral promise should be the basis of an obligation. Adequacy is never insisted on under the present rules; the rule of (so-called) mutuality, hence, insures only a fictitious mutuality and does not advance reciprocity or natural justice. This last is left to parties.

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[7]James Fitzjames Stephen. § 17 of the Statute of Frauds, 1 L. Q. R. 1.
[8]Mommsen, History of Rome c. 11, p. 153, 169. (Everyman's Ed.)
[9]3 Gibbon, Decline and Fall of the Roman Empire 703, annotated ed. by Millman; Ortolan, History of Roman Law (Ed. 1870, Prichard & Nasmith), 659; Sherman, Roman Law in Modern World (1917) § 749.
[10]Barkley v. Harlan, 55 Miss. 606 (1878); Kolb v. Land Co., 74 Miss. 567 21 So. 233 (1896); Owen Tie Co. v. Bank of Woodland, 101 So. 293 (1924).

3. Subtle refinements are made by our court in determining the existence of consideration, and in distinguishing a present from a past consideration. These nice cavils do not advance justice, but permit repudiation of agreements and are very confusing and difficult of application.

While a past debt is no consideration for a subsequent commitment,[12] if the past debt was made under a promise of a subsequent commitment,[13] or if money is advanced to the promisor and then a subsequent promise is made to repay it,[14] such subsequent promise is obligatory. A surety's contingent liability is consideration supporting a subsequent commitment.[15]

4. Detriment may consist in extension of time, no matter how slight.[16] in forbearance to exersise a tenant's right to remove a house built by him;[17] or in forbearance to bid in one's own property at a judicial sale;[18] in extinguishment of a debt;[19] in relinquishment of a right got by inchoate entry on public land, or of a contractual right;[20] or in giving new security.[21]

The business patronage given a bank by a depositor and the forbearance to remove a special deposit is consideration for a promise by the bank to place the special deposit in a safe and to keep the same.[22]

5. Performance of a pre-existing duty is not consideration to support a new promise unless an additional consideration passes.[23]

Performance of a pre-existing duty is consideration for a new promise or agreement.[24] The performance, being tendered on condition, must

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[12]Bernard v. Miller & Robinson, 158 Miss. 892, 131 So. 274 (1930).

[13]Perkins v. Swank, 43 Miss. 349, 359 (1870). Pope v. Pope, 40 Miss. 516 (1866); Sykes v. Moore, 115 Miss. 508, 76 So. 538 (1917).

[14]Standley v. Miles & Adams, 36 Miss. 434 (1858).

[15]Williams v. Bank, 71 Miss. 858, 16 So. 238 (1894).

[16]State v. Hemingway, 69 Miss. 491, 10 So. 575 (1891).

[17]Dubisson v. Folkes, 30 Miss. 432 (1855); Schumpert v. Dillard, 55 Miss. 348, 361 (1877); Hinds v. Pugh, 48 Miss. 268 (1873); Hall v. Clopton, 56 Miss. 555 (1879); Sanders v. Smith, 5 So. 514 (1888); Atkinson v. Greaves, 70 Miss. 42, 11 So. 688 (1892); Page v. Sadler, 134 Miss. 459, 99 So. 8 (1924); Whitney Cent. Nat. Bank v. First Nat. Bank of Hattiesburg, 158 Miss. 93, 130 So. 99 (1930).

[18]Duff v. Snyder, 54 Miss. 245 (1876).

[19]Magee v. Catching, 33 Miss. 672 (1857).

[20]Newell v. Cryder, 50 Miss. 539 (1874); Soule v. Shotwell & Fitts, 52 Miss. 236 (1876); Love v. Taylor, 26 Miss. 567, 574 (1853); Jones v. Hughes, 66 Miss. 413, 6 So. 239 (1889).

[21]Hooker v. McIntosh, 76 Miss. 693, 25 So. 866 (1899); Pugh v. Gressett, 136 Miss. 661, 101 So. 691 (1924).

[22]Pulliam v. Taylor, 50 Miss. 251 (1874).

[23]Miller v. Bank of Holly Springs, 131 Miss. 55, 95 So. 129 (1923); Tallahatchie Compress & Storage Co. v. Hartshorn, 125 Miss. 662, 8 So. 278 (1921); Grenada Bank v. Moore, 131 Miss. 339, 95 So. 449 (1923).

[24]Keith & Hasting v. Miles, 39 Miss. 442, (1860); Jones v. Perkins, 29 Miss. 139 (1855).

[24]Greener & Son v. Cain & Son, 131 Miss. 33, 101 So. 859 (1924); Whitney v. Cooke, 53 Miss. 551 (1876); Y. & M. V. Ry. v. Fulton, 71 Miss. 385, 14 So. 271 (1893); Clayton v. Clark, 74 Miss. 499, 21 So. 565 (1896); McCall v. Nave, 52 Miss. 494 (1876); Sideboard v. Railroad, 161 Miss. 4, 133 So. 669 (1931).

be accepted with its conditions. (*Greener v. Cain,* 101 So. 859. See, however, *McLean v. Love* (1934) in which the terms of a tender were successfully repudiated after acceptance of the tender.)

But performance of a pre-existing duty is not consideration supporting a third-party-beneficiary contract.[24b]

Promises based on executory promises to perform prior duties are not enforceable.[25]

6. The compromise of disputed claims is consideration for a release or other promise,[26] provided there was a legal basis for the claim.[27]

7. Creditor-beneficiaries may recover under third-party-beneficiary agreements, even though no consideration moved between the beneficiary and the promisor.[28]

If a "substantial and articulate" interest exists between the promisee and the beneficiary, the beneficiary may recover from the promisor, even though the beneficiary is not a creditor.[29]

8. The consideration for a promise need not be adequate.[30] Trivial value is sufficient.[31]

9. An agreement to give up a contractual right,[32] or a legal advantage,[33] need not be based on consideration.

B

The Statute of Frauds

1. The Statute of Frauds requires the determination of the subjects included within the numerous and vaguely worded subdivisions of it.

[24b]Allen v. Smith & Brand, 160 Miss. 303, 133 So. 599 (1931).

[25]Leggett v. Vinson, 155 Miss. 411, 124 So. 472; Keith & Hastings v. Miles, 39 Miss. 442 (1860); Bell v. Oates, 97 Miss. 790, 43 So. 491 (1910).

[26]Long v. Shakleford, 25 Miss. 559 (1853); Field v. Weir, 28 Miss. 56 (1854); Pierce v. Garnett, 142 Miss. 641, 107 So. 885 (1926); Fair Tie Co. v. Warrell, 147 Miss. 412, 112 So. 24 (1927); Stanley v. Sumrall, 147 So. 786 (1933); Calhoun v. Calhoun, 37 Miss. 668 (1859); Bissinger v. Lawson, 57 Miss. 36 (1879); Marsh v. Lisle, 34 Miss. 173 (1857); Boone v. Boone, 58 Miss. 820 (1881); Swanson v. Griffin, 68 Miss. 319, 8. So. 511 (1890).

[27]Gunning v. Royal, 59 Miss. 45 (1890); Foster v. Metts & Co., 55 Miss. 77 (1877); Fetterman v. Badger, 162 Miss. 547, 139 So. 406 (1932).

[28]Moore v. Kirkland, 112 Miss. 55, 72 So. 855 (1916); Dodge v. Cutrer, 100 Miss. 647, 56 So. 455 (1911); Hickory Investment Co. v. Wright Lum. Co., 152 Miss. 825, 119 So. 308 (1928); Sweatman v. Parker, 49 Miss. 19 (1873); Barnes v. Jones, 111 Miss. 337, 71 So. 573 (1916); Gilliam v. McLemore, 141 Miss. 253, 106 So. 99 (1925).

[29]Sideboard v. Ry. Co., 161 Miss. 4, 133 So. 669 (1931).

[30]Dantzler Lum. Co. v. State, 97 Miss. 355, 53 So. 1 (1910); Fairly v. Fairly 38 Miss. 280 (1859); Meder v. Sup. Oil Co., 151 Miss. 814, 119 So. 318 (1928).

[31]Magee v. Catchings, 33 Miss. 572 (1857); Grenada Bank v. Moore, 131 Miss. 339, 95 So. 449 (1923).

[32]Stonewall Life Ins. Co. v. Cooke, 165 Miss. 619, 144 So. 217 (1932); Colt & Co. v. Kelley, 142 Miss. 617, 107 So. 757 (1926); Mackie & Co. v. Dale & Sons, 122 Miss. 430, 84 So. 453 (1920).

[33]Beasley v. Evans, 35 Miss. 192 (1858).

The complexity of the few Mississippi cases on the point reflect the faults of the act, which enacted technical and artificial rules to govern what should be a very simple matter, i.e., the regulation of law requiring specified agreements to be in writing.

Corporate stock is personalty, within Section Seventeen.[34] Growing trees are realty, with Section Four.[35] Cut logs are personalty.[36] An equitable mortgage on land is realty.[37] A parol license to enter and build on land is not within the act.[38] An easement is within the act.[39] An oral agreement to construct a dividing line fence is not within the act.[40] An oral agreement to remove a building from land is within the act.[41] An oral agreement to exchange lands is within the act.[42] An oral partition of lands by tenants in common, followed by possession, is not within the act.[43] An oral agreement to settle a boundary dispute is not within the act if followed by occupancy.[44] An oral purchase of land followed by occupancy, improvements on the land, and part payment of the purchase price is within the act.[45] But an oral agreement to convey land is valid if made before the promisor purchased it, doctrines of inurement notwithstanding.[46] The non-signing vendee who took a deed poll and recorded it and entered into possession is estopped to assert the Statute of Frauds when sued for the price.[47] The act does not apply to agreements to pay a commission to a broker out of the price of land sold by him.[48]

2. The Seventeenth Section is satisfied by part delivery alone, no matter how trifling. The seller cannot by mere agreement hold as bailee of the buyer. To constitute delivery the buyer must assume control of the *res,* his acceptance being an admission provable by oral evidence.[49]

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[34]Mayhaw Canning Co. v. Cohen, 135 Miss. 378, 99 So. 896 (1924).

[35]Harrell v. Miller, 35 Miss. 700 (1858); Walton v. Lowrey, 74 Miss. 484, 21 So. 243 (1896); McKenzie v. Shows, 70 Miss. 388, 12 So. 336 (1892); Nelson v. Lawson, 71 Miss. 819, 15 So. 798 (1894); Queen City Hoop Co. v. Barnette, 127 Miss. 66, 89 So. 819 (1921); Osler v. Atlas Assur. Co., 127 Miss. 511, 90 So. 185 (1922).

[36]Turner v. Planter's Lumber Co., 92 Miss. 767, 46 So. 399 (1908).

[37]Gothard v. Flynn, 25 Miss. 58 (1852).

[38]N. O. J. & G. N. Ry. v. Moye, 39 Miss. 374 (1860); Agnew v. Jones, 74 Miss. 347, 23 So. 25 (1896).

[39]Jenkins v. McQuaid, 153 Miss. 185, 120 So. 814 (1928); Bonelli v. Blakemore, 66 Miss. 136, 5 So. 228 (1888).

[40]Berry v. Jones, 106 Miss. 115, 63 So. 341 (1913).

[41]McLeod v. Clark, 110 Miss. 861, 71 So. 11 (1916).

[42]Connor v. Tippett, 57 Miss. 594 (1880).

[43]Wildey v. Bonney, 31 Miss. 644 (1856); Pipes v. Buckner, 51 Miss. 848 (1876); Natchez v. Vandervelde, 31 Miss. 706 (1856).

[44]Archer v. Helm, 69 Miss. 730, 11 So. 3 (1892).

[45]Fisher v. Kuhn, 54 Miss. 480 (1877); Howie v. Swaggard, 142 Miss. 409, 107 So. 556 (1926); Milam v. Paxton, 160 Miss. 562, 134 So. 171 (1931).

[46]Evans v. Green, 23 Miss. 294 (1852).

[47]Washington v. Soria, 73 Miss. 664, 19 So. 485 (1895).

[48]Hancock v. Dodge, 85 Miss. 228, 37 So. 711 (1904).

[49]Young v. Alexander, 123 Miss. 708, 86 So. 461 (1920).

Part delivery of a lot of logs satisfies the statute.[50]

Delivery of 33 bales of cotton, or other commodity, out of a larger lot, satisfies the statutory requirement.[51]

Delivery of a pitcher constitutes part delivery of a soda fountain, and an oral sale therefor is validated by such act.[52]

But an oral agreement by a seller to hold cattle as bailee for the buyer is not sufficient delivery to take the case out of the act.[53] It seems some other act is requisite, as driving a cow or two out into the road to constitute part delivery, and then returning them to the seller as bailee.

To tag cotton, in the possession and control of the seller, with the buyer's tags in pursuance of an oral agreement of sale is not a valid delivery.[54]

Part payment need not be in money. A book credit,[55] or relinquishment of an alleged contractual right is sufficient,[56] the proof of which rests in oral testimony.

3. The statute is inapplicable to oral executed contracts where only the payment of money remains to be made,[57] or bequeathed.[58]

4. The act applies to promises by which a secondary liability is assumed. It does not apply to original, or primary promises, or to novations.

The application of the foregoing generalization to concrete fact situations is not so simple. No satisfactory definition of an original promise is given.

The act does not apply to a third-party-beneficiary contract, as to the creditor-beneficiary situation. The promisee remains liable unless expressly released. Hence, the test of *Olive v. Lewis,* 45 Miss. 203, as to whether the original debtor-promisee is liable breaks down. Again, a promise to the original debtor does not seem very "direct", as between the creditor-beneficiary and the promisor. Hence, the test suggested by the novation is not helpful when applied to other situations.

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[50]Turner v. Planter's Lumber Co., 92 Miss. 767, 46 So. 399 (1908).

[51]Moreland v. Newberger Cotton Co., 94 Miss 572, 48 So. 187 (1909). Stonewall Mfg. Co. v. Peek, 63 Miss. 342 (1885); Walker v. Daggett, 115 Miss. 657, 76 So. 569 (1917); Crystal Ice Co. v. Holliday, 106 Miss. 706, 64 So. 658 (1914).

[52]Becker & Co. v. Davis Drug Co., 93 Miss. 803, 47 So. 468 (1908).

[53]Easeley v. Stewart, 131 Miss. 756, 95 So. 525 (1923); Ladnier v. Ladnier, 43 So. 946 (1907); Garner v. Broom, 161 Miss. 734, 138 So. 336 (1931).

[54]Burrow & Co. v. Planter's Oil, etc. Co., 138 Miss. 284, 103 So. 9 (1925). To same effect, Entrekin v. Byrd, 149 Miss. 340, 115 So. 562 (1928).

[55]Johnson v. Tabor, 101 Miss. 78, 57 So. 365 (1912).

[56]Pugh v. Gressett, 136 Miss. 661, 101 So. 691 (1924).

[57]Pountain v. Fletcher, 158 Miss. 720, 126 So. 471 (1930); Franklin v. Berry, 125 Miss. 763, 88 So. 331 (1921); Walton v. Lowrey, 74 Miss. 484, 21 So. 243 (1896); Blair v. Russel, 120 Miss. 108, 81 So. 785 (1919); Singletary v. Ginn, 153 Miss. 700, 121 So. 820 (1929).

[58]Ellis v. Berry, 145 Miss. 652, 110 So. 211 (1926).

Neither is it possible for the cases to be reconciled on the theory that an accomodation promisor is within the act, but a promisor for a consideration is not within the act. For, the promisor in *Allen v. Smith & Brand* received a consideration as defined by *Clayton v. Clark,* but it was held that the promisor was not bound by an oral promise, contrary to *Sweatman v. Parker,* and *Moore v. Kirkland,* and *Lee v. Newman.*

The illusory tests suggested by the court, "original", "secondary", "collateral" call to mind the maxim, "words are the counters of wise men."

Specifically,—

A plaintiff furnished goods to the defendant's nephew in reliance on an oral promise of the defendant that he "would see the bills paid." Held, this is a promise to answer for the debt of another, for the nephew remained liable. This last is said to be the test.[59]

A defendant learned that his daughter was in a hospital. He went to the hospital and promised to pay the medical and hospital bills. Further hospitalization was given in reliance on the promise. Held, this was an original promise, and is enforceable as a simple, ordinary contract, especially in view of the service given in reliance on the promise.[60]

An agreement by a sales agent to bear one-half the losses arising from the defaults of his purchasers, in consideration of sharing one-half of the profits, is a direct and an original promise and is not within the statute.[61]

A defendant confirmed bicycle bills of his messenger boys, and wrote his initials after the O.K. Held, this is a promise to pay the debt of another and must comply with the rules on memoranda, and hence is invalid. [62]

A first mortgagee orally promised a plaintiff that he would pay the mortgage debt if the plaintiff would advance the mortgagor the money in order to pay the mortgagee. The plaintiff advanced the money in order that the first mortgagee might be relieved, and the first mortgagee was relieved thereby. Held, this is a promise to answer for the debt of another, and is within the act.[63]

A defendant requested goods to be delivered to a third person,

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[59]Bloom v. McGrath & Compton, 53 Miss. 249 (1876); Hendricks v. Robinson & Stevens, 56 Miss. 694 (1879).

[60]Biglane v. Hicks, 33 So. 413 (1903); Vicksburg Infirmary v. Hines, 134 Miss. 162, 98 So. 530 (1924).

[61]Myer Bridges Co. v. Badeau, 90 Miss. 27, 43 So. 609 (1907).

[62]Postal Tel. & C. Co. v. Friedhof, 127 Miss. 498, 90 So. 182 (1922).

[63]Allen v. Smith & Brand, 160 Miss. 303, 133 So. 599 (1931); U. S. F. & G. Co. v. Parsons, 154 Miss. 587, 122 So. 544 (1929); Wray v. Cox, 86 Miss. 638, 38 So. 547 (1905).

promising to pay for them. Held, the promise was original, and not within the act.[64]

A defendant orally promised to pay a portion of the sum due a contractor to the creditor of the contractor. Held, an original promise, and not within the act.[65]

So, promises to pay for loss caused by another's neglect are original.[66]

Oral promises based on consideration moving to the promisor to pay the promisee's debt to a third party are original and are not within the act.[67]

Novations are not within the act.[68]

5. An oral promise before marriage by a prospective husband to renounce an interest in the land of the prospective wife is within the act.[69] A similar promise made before marriage but after the wedding day had been set was not in consideration of marriage, since the marriage had already been arranged. [70]

6. Short term leases of land begin under the act from the date of their commencement.[71] Agreements for services, under the act, begin from the date of their execution.[72]

An oral promise of a lifetime job is an agreement to be performed within a year and hence is not within the act.[73]

An oral agreement to purchase drugs from the plaintiff exclusively is not to be performed within a year and hence is within the act.[74]

7. The vague requirement of a memorandum in writing has led to uncertainty as to what constitutes a sufficient writing.[75]

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[64]Wallace v. Wortham, 25 Miss. 119 (1852); Hendricks v. Robinson & Stevens, 56 Miss. 694 (1879); Morgan v. King, 128 Miss. 401, 91 So. 30; so also of an agent contracting for a principal under a disability, Victor v. Adams, 140 Miss. 643, 106 So. 433 (1926).

[65]Delta Lumber Co. v. Wall, 119 Miss. 350, 80 So. 782 (1919); McFarland Lum. Co. v. Selby, 129 Miss. 894, 93 So. 434 (1922).

[66]Home Ins. Co. v. Moore & Rawls, 151 Miss. 189, 117 So. 524 (1928).

[67]Sweatman v. Parker, 49 Miss. 19 (1873); Lee v. Newman, 55 Miss. 365 (1877); Ware v. Allen, 64 Miss. 545, 1 So. 738, 60 Am. Rep. 67 (1886); Grace v. Floyd, 104 Miss. 613, 61 So. 694 (1913); Palmer v. Bridges, 151 Miss. 12, 117 So. 328 (1928); Moore v. Kirkland, 112 Miss. 55, 72 So. 855 (1916).

[68]True Hixon Lum. Co. v. McDonough, 154 Miss. 720, 123 So. 855 (1929); Olive v. Lewis, 45 Miss. 203 (1871); Wear-Boogher v. Kelly, 84 Miss. 236, 36 So. 258 (1904).

[69]Pardue v. Ardis, 101 Miss. 884, 58 So. 769 (1912).

[70]Steen v. Kirkpatrick, 84 Miss. 63, 36 So. 140 (1904).

[71]McCroy v. Toney, 66 Miss. 233, 5 So. 392 (1888).

[72]Gulfport Co. F. M. Co. v. Reneau, 94 Miss. 904, 48 So. 292 (1909).

[73]Jackson v. Ry., 76 Miss. 607, 24 So. 874 (1898). Cf. Smith v. Jones, 75 Miss. 325, 22 So. 802 (1897), and Chaffee & Sons v. Benoit, 60 Miss. 34 (1882).

[74]Mallett v. Lewis, 61 Miss. 105 (1883); Cf. Gerachi v. Sherwin Williams, 156 Miss. 36, 125 So. 410 (1930); Hannah v. Covington, 155 Miss. 825, 125 So. 418 (1930).

[75]See Frank v. Eltringham, 65 Miss. 281, 3 So. 655 (1887); Queen City Hoop Co. v. Barnett, 127 Miss. 66, 89 So. 819 (1921); Willes v. Ellis, 98 Miss. 197, 53 So. 498 (1910); Kervin v. Biglane, 144 Miss. 666, 110 So. 232 (1926);

8. Oral waivers are not within the act, where acted on, although the contract right which is waived is within the act.[76]

IV

CONCLUSION

Since the ancient rule of *nudum pactum,* making all executory agreements unenforceable, is unsuited to modern law, and since the rule has been encroached on by numerous and intricate exceptions which leave subject to the rule only unilateral executory promises, and since the rule that the adequacy of consideration is never inquired into prevents the doctrine of consideration from being used to secure actual reciprocity in contracts and obliterates any substantial distinction between bilateral and unilateral contracts grounded in natural justice but leaves the entire matter to the free choice of the parties, subject only to the requirement of valuable (trivial) consideration, it seems desirable that the ground should be cleared of the ancient doctrine and that thereby the necessity of the numerous technical exceptions to it should be removed. It is better to do the thing directly and simply, rather than by resort to artificial exceptions and fictitious values, in order to give liberty to contract as parties desire in their own interest in pursuance of legitimate business.

We do not tolerate the forms of action, and are not driven to resort to the remedy against fraud (i.e., assumpsit) in order to avoid wager of battle and supposed appeals to miracles (*iudicium dei*) to compel parties to keep their word. Hence we should not have to make out a case of fraud to enforce a promise, or to be cumbered with the husk of the old procedure (consideration: detriment to the plaintiff-promisee in reliance on a promise or representation) with its numerous refinements and exceptions in enforcing simple contracts. As stated, the old rule has been cut down so that only unilateral executory promises are subject to it.

This last subject of the rule should be emancipated in order to bring consistency and simplicity to the law of contract, and to give full recognition to the liberty to contract, and to sanction promises made with due formality in the exercise of this liberty, instead of the partial and crotchety recognition given by way of fictions and exceptions.

The topics included in the Statute of Frauds are so fragmentary and the phrasing of the act is so indefinite that a radical revision should be

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Strum v. Dent, 141 Miss. 648, 107 So. 277 (1926); Marqueze v. Caldwell, 48 Miss. 23 (1873); Young v. Adams, 122 Miss. 1, 84 So. 1 (1920); Johnson v. Brooks, 31 Miss. 17 (1856).

[76]Mackie & Co. v. Dale & Sons, 122 Miss. 430, 84 So. 453 (1920); Lee v. Hawks, 68 Miss. 669, 9 So. 828 (1891); Kelly v. Skates, 117 Miss. 886, 78 So. 945 (1918); McDonnell Con. Co. v. Delta Pine Land Co., 163 Miss. 646, 141 So. 757 (1932).

made, in the interest of the same simplicity and economy pointed out above. If writing is needed at all, it should not be limited merely to the subjects enumerated in the act, but should include all important agreements, i.e., those involving more than a specified amount. The language and the requirements of the act should be made precise and simple, as in all civilized countries not under the common law.

The difficulties of the Mississippi cases, decided under obsolete statutes and rules, prove the need for revision. The mass of rules resulting from this imperfect body of legislation and common-law precedent well deserves the gibe:

" . . . the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances."

This condition can be and will be corrected when the law is subjected to a critical examination, in the light of its history, as an instrumentality of justice. The present outline of the problem is set forth to call attention to the cumbersome inefficiency of the rules on the formal requisites of contracts.

We have had no superstitious veneration for ancient doctrines as such. If the criticisms directed at the doctrine of consideration and the Statute of Frauds are well founded, the doctrines will be modified in the course of time by the same people who abolished absolutism and the prerogative of the crown and privileged castes, who established religious toleration by the state, and the separation of the church and the state, in the realm of public law, and who have established far-reaching rules of real property, inheritance, contract, tort, domestic relations (Mississippi being the first state to remove married women's disabilities), in the realm of private law, in complete disregard of precedents of leading monarchies and enlightened despotisms, where such precedents were harsh and unjust. For it is to be expected that the English speaking peoples will maintain their passion for liberty and their talent for self government and their power of self-restraint.

The difficulties of the doctrine of consideration and of the Statute of Frauds are not formidable in comparison with the major problems that have engaged the attention of the public in Mississippi during the century of the history of the state. Indian wars, frontier hardships, the War of 1812, carried on in the South largely by Mississippi volunteers under Jackson, the Mexican War, which made secure the national domain in the Southwest, the Civil War and the Reconstruction, by the result of which the sacred Northern Tariff Union was preserved at the expense of the servient sections in the South and the West, the destruction of staple crops by insects, unparalleled pestilence, now conquered by science, race problems, floods, World Wars and the horrors of a

half-peace and splendid isolation, tariff wars, paralysis of world and domestic trade, depression and emergency measures,—these have been the problems that have engaged the state. It is arguable that, given time and correct information, the problems of private law will be met with the same resolution as shown on more difficult problems. It is also to be expected that lawyers will make available, in the interest of good government, the resources of knowledge and experience in the discussion of this and all matters of general concern, and in correcting defects in this branch of the law, as has been the case in the past. The liberties and rights, the institutions and laws of the English-speaking races could not have been brought into existence and preserved and improved without the technical experience and the partiotism of the legal profession.

NOTE AND COMMENT

THE ATTITUDE OF THE SUPREME COURT AS TO THE EFFECT OF WAR ON TREATIES

There is no phase of treaty interpretation upon which there has been less agreement than that of the effect upon a treaty of a war between the contracting parties.[1] For this reason it is of interest to note the attitude which the Supreme Court has taken upon this controversial question. Two cases involving the effect of war upon treaties have been decided by the Court.[2] The first of these, *Society for the Propagation of the Gospel v. New Haven,*[3] was decided as early as 1823, and involved the question of the effect of the War of 1812 on the Jay Treaty.[4] Although the Court actually based its decision upon other grounds, it expressed certain views upon this question. The facts in the case were as follows: A corporation, chartered by the King of England for the pur-

[1]See TOBIN, H. J., THE TERMINATION OF MULTIPARTITE TREATIES (1933), 1, who says, "The attempt to determine the effect of war on treaties has occasioned great diversity of view, a diversity which appears as far from being reconciled today as at any time in the past. Principal causes of this lack of uniformity of opinion appear to be uncertainty regarding the nature of war, and the widespread and rapid development of the treaty relations between states, which render obsolete many of the conceptions of earlier periods."

See, also, Garner, J. W., "Preliminary Draft Convention on Treaties," *for Harvard Research in International Law.* MS. "In the absence of a provision to the contrary, the existence of war does not *ipso facto* terminate or suspend the obligations of any treaty.

"A State has the right to consider a treaty as terminated between itself and another State when war exists between them, provided:

(a) The treaty is one which cannot by reason of its nature or object survive the existence of war; or

(b) The continuance in force of the treaty was intended by the parties to depend upon the existence of a state of peace between them; . . ."

Cf. Hurst, Sir Cecil J. B., THE EFFECT OF WAR ON TREATIES, 2 BRITISH YEAR BOOK OF INT. LAW (1921-1922), 37-47. SCOTT, RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW (1916), 171-174, Resolutions on the effect of war on treaties adopted at Christiana in 1912. STANDARDS IN INTERNATIONAL LAW (1921), 34 HARV. L. REV. 776-779. BORCHARD, E. M., THE EFFECT OF WAR ON THE TREATY OF 1828 WITH PRUSSIA, 26 AM. J. INT. L. (1932), 582-586. See THE EFFECT OF WAR UPON TREATIES AND PRIVATE RIGHTS UNDER TREATIES, 38 YALE L. J. (1929), 514-520. See, also, 53 JOURNAL DU DROIT INTERNATIONAL (Clunet, 1926), 471-472.

[2]There have been several such decisions by state and lower federal courts; for example, The Sophie Rickmers, 45 F. (2d) 413, D. C. S. D. N. Y. 1920; Flensburger Damfercompanie v. United States, 59 F. (2d) 464, Ct. Cls. 1932; McCandless v. United States, 25 F. (2d) 71, C. C. A. 3rd, 1928; Hempel v. Weeden, 23 F. (2d) 949, D. C. W. D. Wash., N. D. 1928; State ex rel. Miner, County Att'y v. Reardon, 120 Kans. 614, 245 Pac. 158 (1926).

[3]8 Wheat. (U. S.) 464, 5 L. ed. 662 (1823).

[4]Cf. Sutton v. Sutton, 1 R. & M. 663, 675 (1830). Hutchinson v. Brock, 11 Mass. 118 (1814). But see TOBIN, *op. cit.*, 17, who says, "The judiciary has been slow to abandon the theory of uniform termination of treaties between belligerents. In the early nineteenth century the United States courts appeared to have accepted this point of view, but the cases involved did not deal with

pose of preaching the gospel in foreign parts, was given certain rights to purchase and own property. The province of New Hampshire had incorporated the town of New Haven in 1761, and one of the sixty-eight shares of this town had been granted to the English corporation. On October 30, 1794, the legislature of Vermont, in which state the town is now located, passed an act declaring that the property granted to the English corporation was thereby granted severally to the towns in which the said property was situated. The act also provided that the selectmen of each town might sue to receive such lands, if necessary, and under that act the present case was brought.

One of the questions argued before the Court was whether the War of 1812 had abrogated Article 9 of the Jay Treaty of 1794,[5] so as to divert the property rights guaranteed by that article. Article 28 of the treaty provided that the first ten articles should be regarded as permanent, whereas the remainder of the treaty was to expire within a specified number of years after the treaty was ratified.[6] The property rights in this case were guaranteed both by Article 6 of the treaty of peace[7] and by Article 9 of the Jay Treaty of 1794.[8] It was up to the Court to decide whether rights of this nature, once granted, could logically be divested. Justice Washington delivered the opinion of the Court. The actual holding was that property rights once vested in a corporation, such as that of the plaintiff or in an individual, were not altered by a subsequent war between the parties.[9] In other words, the Court held that the rights guaranteed by the Jay Treaty were already vested in private hands when the War of 1812 broke out.[10]

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the type of treaties indicated above as usually exempted, such as those concerned with the conduct of war, or dispositive conventions, but rather with treaties involving matters still frequently held to be included among those affected by the advent of war. When a case came up in 1823 involving a dispositive provision, however, the provision was held to be at most suspended, and the American courts have never gone back since that time to the general termination theory."

[5]Art. IX of the Jay Treaty, 8 STAT. 116, 122 (1794), provides "that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens."

[6]Article XXVIII of the Jay Treaty, 8 STAT. 116, 129 (1794), provides: "It is agreed, that the first ten articles shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years, to be computed from the day on which the ratifications of this treaty shall be exchanged, . . ."

[7]Article VI of the Treaty of Peace of 1783, 8 STAT. 81, 83 (1783), provides "That there shall be no future confiscations made, nor any prosecutions commenced against any person or persons for, or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property; and that those who may be in confinement on such charges, at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued."

[8]See *supra* note 5.

[9]See 2 HYDE, INTERNATIONAL LAW (1922), 93,94.

[10]The Treaty of Ghent did not provide for the renewal of pre-existing treaties. The Supreme Court held in this case that those rights once granted could not be divested by a subsequent war. See Hurst, *loc. cit.*, 37-47.

In the opinion, the Court commented on the effect of war on treaties, but since this was not the basic question, the view of the Court must be regarded as dictum. It was asserted that there were certain kinds of treaties which war between the parties could not abrogate. Among these were treaties which created vested rights, as illustrated by Article 9 of the Jay Treaty which had guaranteed property rights secured by British subjects in the United States. The Court expressly rejected the plea of Daniel Webster, counsel for the defendants, that wars *ipso facto* extinguished all treaties.[11] The Court said, "There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war."[12] Thus, it was the opinion of the Court on this one subject that treaties stipulating for permanent rights and arrangements, and also professing to aim at perpetuity did not cease with the occurrence of war.[13] It was the view of the Court that some treaties were merely suspended while the war lasted, "and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."[14]

Even if the Court had found that the War of 1812 had abrogated all the provisions of the Jay Treaty, its final holding would hardly have been changed, for, as was pointed out, it depended upon other considerations. The Court's dictum is of interest, however, inasmuch as it was asserted that the opening of war does not abrogate all treaties. This seems to be borne out by the actual practice among nations,[15] for it is not only clear that upon the occurrence of war some treaties between the belligerents are first set into operation, but also that no nation would seriously contend that the opening of war abrogates all treaties between it and the other belligerent.[16] However, those who take the position that

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[11]8 Wheat, (U. S.) 464, 479-480, 5 L. ed. 662 (1823). Webster argued "that even supposing the treaties of 1783 and 1794 protected the rights of property of the plaintiffs, whether beneficial or fiduciary, yet the late war abrogated such provisions of those treaties as were not revived by the peace of Ghent. The general rule certainly is, that whatever subsists by treaty, is lost by war (citing, MARTENS' LAW OF NATIONS, lib. 2, c. 1, sec. 8, and VATTEL, DROIT DES GENS, lib. 3, c. 10, sec. 175). Peace merely restores the two nations to their mutual state. Foreigners cannot, independent of conventional stipulations, by the general usage of nations, or by the common law, hold lands in this country. This pre-existing law, therefore, revives; there being no recognition in the treaty of Ghent of the articles of the former treaties, excepting British subjects from the operation of the rule."

[12]8 Wheat. (U. S.) 464, 494, 5 L. ed. 662.

[13]PHILLIPSON, C., TERMINATION OF WAR AND TREATIES OF PEACE (1916), 250-268. Hyde, *supra* note 9; see 38 YALE L. J. (1929), 514-520.

[14]8 Wheat. (U. S.) 464, 495, 5 L. ed. 662 (1823).

[15]See 2 OPPENHEIM, INTERNATIONAL LAW (3rd ed., 1921), sec. 99; HALL, INTERNATIONAL LAW (7th ed., 1917), 398-401; PHILLIPSON, *supra* note 13; DAVIS, G. B., ELEMENTS OF INTERNATIONAL LAW (4th ed., 1916), 239-240; see Dana, note 143, WHEATON, INTERNATIONAL LAW (8th ed., 1866), 352-353; GARNER, J. W., RECENT DEVELOPMENTS IN INTERNATIONAL LAW (1925), 420-431; 3 PHILLIMORE, COMMENTARIES ON INTERNATIONAL LAW (3rd ed., 1885), 792-811, pt. XII, Ch. 11; 5 MOORE, DIGEST, sec. 779; SCOTT, J. B., *op. cit.*, 171-174.

some pre-existing treaties must be considered as having been abrogated by war when the peace treaty fails to renew them have some foundation for their contention.[17] Nevertheless, it seems to have been the opinion, but not the holding, in the *Society for the Propagation of the Gospel* case that wars do not put an end to all these treaties and this view seems to be accepted by most jurists and publicists of the present day.[18]

A little over a hundred years after Justice Washington delivered the opinion in the above case, the Supreme Court was again called on to determine certain private rights alleged to have been derived from the treaty of 1794. In this case, *Karnuth v. United States,*[19] Article 3 of the treaty was brought directly before the Court, which had to decide whether that provision of the treaty had been abrogated by the War of 1812, and by the failure of the peace treaty of 1814 to revive expressly pre-existing treaties.[20]

The facts in the *Karnuth* case were as follows: The relators, British subjects and residents of Canada, entered the United States, one to engage in employment and the other to seek employment. Both were arrested and ordered to be excluded by the immigration authorities because they did not have the visas required by the act of Congress of 1924. The relators, on petition for a writ of habeas corpus, protested their detention and claimed that Article 3 of the treaty of 1794 with Great Britain permitted them to pass at will from Canada into the United States. The district court denied the writ and thus upheld the authorities and the act of Congress. This was reversed by the circuit court which held that the War of 1812 did not terminate Article 3 of the Jay Treaty. From this ruling there was an appeal to the Supreme Court.[21]

The Supreme Court decided, Justice Sutherland delivering the opinion, that Article 3 of the Jay Treaty which provided that there should be ingress and egress of Americans, Canadians, and Indians[22] had been abrogated by the War of 1812. The Court claimed that it was not the intention of the parties that Article 3 should survive a war, for if they had so intended, a provision to that effect would have been inserted in

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[16]Garner, "Preliminary Draft," MS., *supra* note 1.

[17]WESTLAKE, J., INTERNATIONAL LAW (1904), Pt. 1, 285-286. This view is too narrow. His suggested limitations upon the treaties that survive war seem to follow the antiquated rule that, in the absence of treaty provisions to the contrary, war terminates all treaties. The general agreement among writers, the practice of nations, and case law would seem to indicate that, in the absence of contrary stipulations at the time of the treaty of peace, more treaties survive than Westlake was prone to admit.

[18]2 HYDE, *op. cit.,* 93-94.

[19]279 U. S. 231, 244, 49 Sup. Ct. 274, 73 L. ed. 677 (1929).

[20]Article III of the Jay Treaty, 8 STAT. 116, 117 (1794), here pertinent, is: "It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's Bay Company only excepted) and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other." Quoted by the Court, 279 U. S. 231, 236, 49 Sup. Ct. 274, 73 L. ed. 677 (1929).

[21]See United States v. Karnuth, United States Director of Immigration, 24 F. (2d) 649, 753 (C. C. A., 2nd, 1928).

[22]McCandless v. United States, 25 F. (2d) 71 (C. C. A., 3rd, 1928).

the treaty of Ghent. The fact is not to be overlooked, however, that Article 28 of the Jay Treaty provided that the first ten articles should be permanent.[23] Nevertheless, the Court interpreted this provision to mean that since all the other articles were limited to a specific time, the first ten were to be permanent only in the sense that there was no stated date for their termination. Thus, the Court held that Article 3 by its very nature was not to extend after a war; and therefore, that it was annulled by the later War of 1812.

Although this was the holding of the Court, there is another point that cannot be disregarded. The Immigration Act of 1924,[24] which prohibited the free ingress of Canadian subjects, was in direct conflict with Article 3 of the Jay Treaty.[25] In such a case the Supreme Court will apply the act of Congress since it is of later date than the treaty. Thus it would seem that the Court could hardly have upheld the treaty provision in question.[26]

The Court undoubtedly took all these factors into consideration and held that Article 9 and Article 3 of the Jay Treaty related to fundamentally different things. It held that Article 9 provided for rights which were permanent from the time they vested whereas, "the privilege accorded by Article III is one created by the treaty, having no obligatory existence apart from that instrument, . . . It is, in no sense, a vested right. It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility . . . And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war . . . It follows that the provision belongs to the class of treaties which does not survive war between the high contracting parties, . . ."[27] It would appear from this ruling that only Articles 9 and 10 of the Jay Treaty are still in effect and therefore survived the War of 1812.[28]

[23]See *supra* note 6.

[24]Immigration Act of 1924, c. 190, 43 STAT. 153; U. S. Code, Title 8, sec. 203.

[25]8 STAT. 116, 117 (1794), see *supra* note 20.

[26]38 YALE L. J. (1929), 514-520.

[27]279 U. S. 231, 239-240, 49 Sup. Ct., 274, 73 L. ed. 677 (1929).

[28]8 STAT. 116, 122 (1794), Art. X. "Neither the debts due from individuals of the one nation to the individuals of the other, nor shares, nor monies which they may have in the public funds, or in the public or private banks, shall ever in any event of war or national differences be sequestered or confiscated, it being unjust and impolitic that debts and engagements contracted and made by individuals, having confidence in each other and in their respective governments, should ever be destroyed or impaired by national authority on account of national differences and discontents."

As to the present status of the treaty see Dennis, W. C., THE EFFECT OF WAR ON TREATIES, 23 AM. J. INT. L. (1929), 602, 605. Speaking of Karnuth v. United States, Dennis says, "The decision is, of course, so far as its legal effects go, confined to the particular provisions before the court. It would seem, however, that similar considerations would apply to the remaining provisions of Article 3, as well as to Article 1 of the treaty. Article 2 and Articles 4 to 7 have been carried into effect. Article 9 stands by virtue of the judicial decisions heretofore noticed and Article 10 which makes express provision for time of war would under all the authorities not be annulled by war. The remaining articles of the treaty appear to have expired by limitations. The conjecture is hazarded, therefore, that the principles enunciated in the decision leave no part of the Jay Treaty in force except Articles 9 and 10, . . ."

Karnuth v. United States was the first case in which the Court directly held that certain provisions of a treaty did not survive a war or that wars abrogated certain types of treaties.[29] The Court attempted to reconcile its decision in this case with the opinion of Justice Washington in the case of *Society for the Propagation of the Gospel v. New Haven.*[30] As was stated above, that case asserted that rights once vested in a private corporation survived the War of 1812, but contained no decisive opinion as to the effect of war upon treaties. In the *Karnuth* case the opinion dealt directly with the effect of war on Article 3. Moreover, the holding was no doubt governed by the view of the political departments, for the Court was not only bound by the restrictions placed upon immigration by the act of Congress,[31] but, it also usually attaches a great deal of weight to the policy of the executive departments.[32] Perhaps a more liberal construction of Article 3 in favor of British and Canadian subjects would have been an ideal interpretation of the treaty, but there seems to be no reasonable ground on which the Court could justify such a liberal view, since it would have been contrary both to the acts of the legislative department and the policy of the executive.[33]

There had been a number of lower court decisions based on somewhat similar facts as those found in *Karmuth v. United States.*[34] In most of these decisions it was held that Article 3 of the Jay Treaty survived the War of 1812; in fact, that was the holding of the circuit court of appeals in the *Karnuth Case.*[35] But the matter is at present definitely settled by the Supreme Court that rights such as those granted by Article 3 are abrogated by war, and perhaps it is a correct inference to conclude that the entire treaty was abrogated. Of course, one must make an exception of rights vested as were those under Articles 9 and 10 of that treaty.[36]

These two cases are the only instances in which the Supreme Court has directly passed upon the question of the effect of war on treaties. In *Techt v. Hughes,*[37] however, decided by the highest court of New York, a writ of certiorari was denied by the Supreme Court[38] which fact may indicate that the views expressed conformed to that of the majority of the Court. Judge Cardozo, at present a justice of the United States Supreme Court, delivered the opinion. In view of these considerations, the writer feels that *Techt v. Hughes* is of sufficient importance to the present discussion to warrant a more detailed examination of the case.

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[29]See Note, 38 YALE L. J. (1929), 514, 519, Note 30. "Any attempt to read an implied condition relating to war into such treaties would seem to exceed the scope of interpretation. The question of the effect of war on these treaties is more a question of the present policy of the political department than of the intention of the parties at the time the treaty was concluded."

[30]279 U S. 231, 49 Sup. Ct. 274, 73 L. ed. 677 (1929).

[31]*Supra* note 29.

[32]See Dennis, *loc. cit.,* 602-605.

[33]See *supra* note 29.

See, also, MCNAIR AND LAUTERPACHT, ANNUAL DIGEST, 1927-28 (1931), 536, Editors' note to the McCandless case, and see the cases on the effect of war on treaties, *ibid.*

[34]See *supra* note 2.

[35]24 F. (2d) 649-653 (C. C. A., 2nd, 1928).

[36]See *supra* notes 5 and 28.

[37]229 N. Y. 222, 128 N. E. 185 (1920).

[38]254 U. S. 643, 41 Sup. Ct. 14, 65 L. ed. 454 (1920).

The facts were as follows: On December 27, 1917, an American citizen died intestate in New York where he owned land. Two daughters survived him, one of whom, Mrs. Techt, had married a citizen of Austria-Hungary in 1911; and had, according to American law, acquired the nationality of her husband. She continued to reside in the United States, even after war was declared against Austria-Hungary on December 7, 1917. The other daughter, Mrs. Hughes, brought action to bar the claim of her sister to a share in the father's property on the ground that Mrs. Techt was an alien enemy and therefore could not own real property according to the laws of New York. It appeared that Mrs. Techt had not been interned as an enemy, nor had she come under any of the special disabilities placed on alien enemies by the act of Congress. She claimed the right of inheriting her share of the property by reason of a treaty between the United States and Austria of 1848, in force at the outbreak of the war, which provided that nationals of each country could take land by descent within the other country, sell it within two years, and then remove the proceeds.[39]

Judge Cardozo, after a thorough examination of the views of writers on public law, of the decided cases, and the practice among states, sought to find a common element or rule which had prevailed in order that he might set up a standard to follow in this particular case.[40] One of his conclusions or standards was that some treaties are abrogated in case of war only in so far as and to the extent that the execution of the treaties is incompatible with war. The clauses of the treaty involved in this case gave reciprocal rights of inheritance to the subjects of each country within the domain of the other. The Court held that treaties of this nature survived the outbreak of war because the treaty provisions were "in keeping with the traditions of the law, the policy of the statutes, the dictates of fair dealing, and the honor of the nation."[41] Thus, on principle, this standard of Judge Cardozo, recognizes the general duty of sovereign nations to abide by their treaties and excuses the performance thereof only where and when it is impossible. It definitely decided, so far as this case is concerned, that certain treaties are not abrogated by later wars between the parties.[42]

Perhaps this ruling of the highest court of New York is the best

[39]8 STAT. 398 (1829). Techt v. Hughes, 229 N. Y. 222, 228, 128 N. E. 185, 186 (1920): "The Treaty says that 'Where, on the death of any person holding real property, or property not personal, within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of two years to sell the same; which term may be reasonably prolonged, according to circumstances; and to withdraw the proceeds thereof, without molestation, and exempt from any other charges than those which may be imposed in like cases upon the inhabitants of the country from which such proceeds may be withdrawn.'"

Article II of the Convention between the United States and Austria concluded May 8, 1848, and proclaimed Oct. 25, 1850, 9 STAT. 944 (1850), extending the stipulations of the treaty of Commerce and Navigation, concluded August 27, 1829, and proclaimed February 10, 1831, 8 STAT. 398 (1829).

[40]See 34 HARV. L. REV. (1921), 776-779.

[41]229 N. Y. 222, 247, 128 N. E. 185, 193 (1920).

[42]Cf. Sutton v. Sutton, 1 R. & M. 663 (1830), with cases referred to in PHILLIPSON, *op. cit.*, 250-268; see MCNAIR AND LAUTERPACHT, ANNUAL DIGEST, 1925-1926 (1929), 438-440; BORCHARD, *loc. cit.*, 582-586.

exposition on the effect of war upon treaties to be found in the decisions of any of our courts.[43] According to Judge Cardozo's standard there are certain treaties such as the one with Austria-Hungary which are not affected by war. The two Supreme Court cases have contributed very little to the solution of this controversial question since in one it may be doubted whether there was any definite decision on the effect of war on treaties and in the other the Court considered that war had abrogated the treaty provision in question. As a principle of law, however, the Supreme Court has recognized the fact that not all treaties are abrogated by war, but it has never decided exactly what kinds of treaties survive war. On one point, however, its jurisprudence is clear, namely, that private rights once vested by a treaty cannot be divested by a subsequent outbreak of war between the parties.[44]

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[43]McNair and Lauterpacht, Annual Digest, 1927-1928 (1931), 536, in an Editor's note on McCandless v. United States, say: "So far as the termination of treaties by the outbreak of war is concerned, this decision would seem by implication to be overruled by the decision in *Karnuth v. United States*, though the editors venture to prefer the decision in the McCandless case."

[44]Society v. New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662 (1823); see, also, Chirac v. Chirac, 2 Wheat. (U. S.) 259, 4 L. ed. 234 (1817).

RECENT IMPORTANT DECISIONS

APPLICATION OF PAYMENTS—RIGHTS OF INDORSER TO HAVE PAYMENT APPLIED TO PART OF THE DEBT ON WHICH HE IS LIABLE

Where notes and mortgage providing for future advances were not considered sufficient by the creditor, and the indorsers signed the notes as additional security, and additional advances having been made by such creditor, the proceeds of the property were first applied by the creditor to the advances not secured by such indorsement, in accordance with agreement between debtor and creditor of which the indorsers had no knowledge, HELD: that the indorsers were not liable thereon, where the proceeds from the property were sufficient to discharge the notes, if they had been first applied thereto. *Washington County Credit Corporation v. Miller et. al.*, ... Miss. ...., 157 So. 343 (1934).

Where the creditor and debtor are the sole parties concerned the rules as to the application of payments made by the debtor are fairly clear and present little difficulty.[1] But where the rights of third parties, such as guarantors, sureties and indorsers, are involved, the application of payments, where such application is made either by the debtor or creditor, involves questions not always easy of determination. There may be certain instances in which the surety or indorser has a right to have the application made to the portion of the debt on which he is liable.

In a discussion of the instant case several factors should be borne in mind. First, the indorsers signed the notes as additional security, their liability being the amount of the notes. Second, the indorsers knew of the execution of the mortgage. Third, the mortgage gave a prior lien on the mortgaged property in favor of the holder or holders of the notes, guaranteeing the payment of the notes in preference to other indebtedness secured by the mortgage. Fourth, the mortgage also provided for futures advances. And, fifth, the agreement by the debtor and creditor as to the appropriation of the payment was made after the indorsement and without the consent of the indorsers.

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[1]The debtor is generally accorded the right of determining to what debt the payment will be applied. 3 WILLISTON, CONTRACTS (1920) § 1795. Crisler v. McCoy, 33 Miss. 445 (1857); Champenois v. Fort, 45 Miss. 355 (1871); Rosenbaum v. Meridian Nat. Bank, 73 Miss. 267, 18 So. 549 (1895); Carberry v. Howell, 114 Miss. 549, 75 So. 383 (1917). See 40 HARV. L. REV. 655. However, if the debtor fails to direct the appropriation of the payments, the creditor is deemed to have the right to apply the sum received to any of the debts due from the debtor according to his own wishes. Crisler v. McCoy, 33 Miss. 445 (1857); Champenois v. Fort, 45 Miss. 355 (1871); 3 WILLISTON, CONTRACTS, *op. cit.*, § 1795, 1796. "Following the common law rule it has been held that the creditor may apply a payment either on a note or on an account." 48 C. J. 647, § 94. Upon the failure of both the debtor and the creditor to make appropriation of the payment, the court may direct application of the payment, usually to the advantage of the debtor, unless the intention of the parties appears to have been to the contrary. Williams v. Butts, 124 Miss. 661, 87 So. 145 (1921); 21 R. C. L. 97, § 104; Neal v. Allison, 50 Miss. 175 (1874); McLaughlin v. Green, 48 Miss. 699 (1873); Sunflower County v. Bank of Drew, 136 Miss. 191, 101 So. 192 (1924).

The rule is stated generally as follows: "While the authorities are not entirely in accord third persons, such as guarantors, sureties, indorsers and the like, secondarily liable on one of several debts cannot control the application which either the debtor or the creditor makes of a payment, and neither the debtor nor the creditor need apply the payment in the manner most beneficial to such persons."[2] But this rule has been held to apply solely "to those cases in which the principal makes the payment from funds which are his own and are free from any equity in favor of the surety to have the money applied in payment of a debt for which the surety is liable."[3] The question immediately arises in the present case as to whether any equity is raised in favor of the indorsers by any of the facts stated above.

Since the mortgage was known to the indorsers, and since their contract is made with reference to it, it seems that no distinction should be made between this case, in which the mortgage provided for future advances, and one where all the indebtedness was incurred at once, but one in which the note and indorsement covered only a portion thereof. Nor does the fact that the subsequent agreement as to appropriation by the debtor and creditor without the consent of the indorsers seem to have any effect upon the case in the absence of any evidence of any equity in favor of the indorsers, and in the absence of fraud.

When, however, the fact is considered that the mortgage expressly provided that all other evidences of indebtedness secured by the mortgage should be subordinate to the lien in favor of the holder of the notes, it becomes apparent that an equity of some sort might arise in favor of the indorsers. If they did not rely upon the provisions of the mortgage as to priority of lien in favor of the holder of the notes, of course no equity could arise, for no harm would be done them, and they could not assert that they believed that appropriation would be first made to the part of the debt secured by them. However, if they did rely upon the provisions of the instrument, and believed that the proceeds would be first applied to the notes, it would seem clear that their intention was to become surety only upon that condition. A court of equity, if possible, will not attempt to enforce their liability to an extent greatly beyond that to which they intended that it should be.[4]

If the fact is also shown that the indorsers meant to become security for a limited part of the debt only, they would under ordinary circumstances have a right to have any payment upon the debt from any funds of the debtor applied first upon that part of the debt for which they are security.[5] If the rule were otherwise and the payment could under such circumstances be applied to the unsecured portion of the debt in preference to the secured portion, the surety or indorser would be liable for the amount of the whole debt, and his intention to become surety for a limited portion only would be of no avail.

Undoubtedly, also, if the indorser or surety looked to the mortgaged premises

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[2]3 WILLISTON, CONTRACTS (1920) § 1804; 21 R. C. L. 108, § 115; Philadelphia First Nat. Bank v. Ferrell, 272 Fed. 371 (C. C. A. 3d. 1921), 16 A. L. R. 651; Steiner v. Jeffries, 118 Ala. 573, 24 So. 37 (1898); Consolidated Naval Stores Co. v. Wilson, 82 Fla. 396, 90 So. 461, 21 A. L. R. 681 (1921).

[3]3 WILLISTON, *op. cit.*, §§ 1804, 1806; 21 R. C. L. 109, § 116. Merchant's Ins. Co. v. Herber, 68 Minn. 420, 71 N. W. 624 (1897); Kyle v. Chattahoochee Nat. Bank, 96 Ga. 693, 24 S. E. 149 (1895).

[4]*Supra,* note 3. Mack v. Alder, 22 Fed. 570 (C. C. A. 8th. 1884); Bross v. McNicholas, 66 Or. 42, 133 Pac. 782, Ann. Cas. 1915B, 1272 (1913).

[5]Consolidated Naval Stores Co. v. Wilson, 82 Fla. 396, 90 So. 461, 21 A. L. R. 681 (1921); JONES, COLLATERAL SECURITIES §§ 550, 551; First Nat. Bank v. Scott, 123 N. C. 538, 31 S. E. 819 (1898); 21 R. C. L. 108, § 115.

or property as his security for his indorsement an equity would be raised in his favor, due to the fact that if the proceeds of the mortgaged property were first applied to the part of the indebtedness unsecured by his indorsement, the entire amount of the property might be expended without discharging his liability for which he would thereafter have no security nor any recourse against the debtor.[6]

The court evidently considered the foregoing principles as decisive of the case, and the opinion to such an extent is in accord with the weight of authority. However, a careful consideration would seem to warrant the examination of another point which is apparently a negation of the existence of any equity in favor of the indorsers.

At the time the indorsers placed their signatures on the notes they had full knowledge of the fact that the mortgage and notes were not considered sufficient in themselves, and that their signatures were being secured as additional security. Does it not appear reasonable that they would have understood, in view of the fact that the mortgage expressly secured future advances, that the creditors were seeking additional security? They must have realized that the creditors did not consider the property sufficient security for the payment of the notes alone, or if sufficient for that amount yet insufficient to pay both the notes and the possible advances. In either event, the indorsers must have realized that they might probably have no recourse against the property if they were forced to indemnify the creditor to the amount of the notes. The equity raised in their favor to look to the property then seems to disappear. Likewise they must ordinarily have perceived that the creditors were seeking additional security not merely for the amount of the notes but for any indebtedness incurred by the debtor, or the provision as to future advances would never have been inserted in the instrument securing the notes and advances. It would seem as a result that the rights of the creditors would become paramount to any equity that might have been raised in favor of the indorsers. The court did not consider the principle as applicable, but there seems to be authority for it in at least one other state. The Florida Court in the case of Consolidated *Naval Stores Company v. Wilson*[7] recognizes the same general rules expounded by the Mississippi Court but proceeds further, and states the following principle: "But if the purpose of the indorsement of a limited part of the debt is to afford additional security to the mortgage or other security, it does not follow that the debtor must apply the proceeds of the sale of the mortgaged property to the payment of that particular part of the indebtedness." It is submitted that this principle as stated by the Florida Court is most equitable to all the parties concerned.

Thus far there has been a consideration merely of the question presented by the facts of the case. The court in delivering its opinion, by way of dictum, intimated that its decision would have been precisely similar even if the mortgage had contained a provision that the proceeds of the mortgaged property should first be applied to that part of the indebtedness not secured by the indorsement. It would seem that a still stronger case would be made out for the creditor under such circumstances, for the indorsers would be considered to have impliedly consented thereto, inasmuch as they contracted with reference to the mortgage and

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[6]21 R. C. L. 109, § 116; Bross v. McNicholas, 66 Or. 42, 133 Pac. 782, Ann. Cas. 1915B, 1272 (1913); Sturtevant Co. v. Fidelity, etc. Co., 92 Wash. 52, 158 Pac. 740, L. R. A. 1917C, 630 (1916).

[7]82 Fla. 396, 90 So. 461, 21 A. L. R. 681 (1921).

its provisions. The Florida court has again laid down the principle that appears most equitable, and, under the same facts supposed, has held that the indorser does not have a right to have payments applied to the portion of the debt for which he is security.[8]

CHARLES S. TINDALL, JR.

CONSTITUTIONAL LAW—IMPAIRMENT OF THE OBLIGATION OF CONTRACT—REORGANIZATION OF BANKS AS IMPAIRMENT

Proceedings by J. S. Love, State Bank Superintendent, opposed by B. L. Dunn and others, for reorganization of the People's Bank & Trust Co. of Tupelo. The People's Bank, having become insolvent closed its doors on Dec. 24, 1930 and wents into the hands of appellee as statutory liquidator. At the time of closing, the Bank owed $200,000 public deposits and $457,000 to correspondent banks, the latter debt being secured by $700,000 collateral. The bank remained in liquidation in Chancery until May 1933. Between December 1930 and May 1933 practically all secured and preferred claims were paid in full.

In the meanwhile there had been a number of depositors meetings and a committee had been appointed to represent the depositors in determining what was best to be done. The committee and representatives of the appellee decided it would be best to reorganize the bank to the end that the remaining assets could be administered by an active banking concern. A plan was finally agreed upon and was presented by petition to the Chancery Court under Chapter 251 of the Laws of 1932. A date for hearing was set and 15 out of 5000 depositors were selected by the Chancellor upon whom notice was served. It was also published in a county newspaper.

The plan agreed upon was substantially as follows:

1. Depositors were to reduce amount owed them to twenty-five per cent of the original amount.

2. One fifth of depreciated amount to be paid on reopening.

3. Balance to be paid in installments. Deferred payments without interest. Remaining seventy-five per cent to be charged off.

4. Where stockholders had secured their stockholders' liability with collateral, on payment of fifty percent of the amount of such liability such collateral would be released and they would be released from fifty per cent of the amount of liability.

5. Bank was to retain all interest realized from assets turned over to it and all rents collected from lands that it held with the privilege of buying such lands with the court's permission.

6. Bank to receive ten per cent of amount collected from pool assets (the remaining seventy-five per cent was to be put into one pool and dividends paid from this as collected) plus expense of collecting same, plus attorney's fees. No new capital was to be paid in to reorganize the new bank. It was to be organized entirely out of the funds of the old one.

HELD: Act providing plan for reopening of closed state banks with approval of chancery not unconstitutional. *Dunn et. al. v. Love,* .... Miss. ...., 155 So. 331 (1934).

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[8] *Ibid.*

This case arose from an application of the Legislative Act of 1932.[1] This law is in effect: "An act providing a plan for the reopening of closed banks by the Superintendent of the Banks of the State of Mississippi, with the approval of the Chancery Court of the county where the bank is situated or of the Chancellor in vacation where three-fourths of the general depositors and creditors of such bank or general depositors and creditors holding three-fourths of the deposits in or claims against such bank agree to accept repayment of their deposits over a period of years."

There was written into the Constitution of the United States a provision that no State shall pass any law impairing the obligations of contracts.[2]

Does this banking act really impair the obligation of contracts? It may be conceived that it does in the light of prior interpretations. At the time the law was passed the bank was already in a state of liquidation, and had been so for a period of two years. Up until this time it has been held that contract obligations are subject to the laws under which they are made.[3] But the court states that a contract with stockholders who take stock in state banks and stockholders double liability so incurred, are subject to subsequent laws reasonably enacted or to be enacted under sovereign power of the state to legislate in the interest of general welfare.[4] While this decision never directly admits that there has been a violation of the guaranty against the impairment of contract obligations it treats the matter thus. Said Judge Griffith, "In considering the constitutional guaranty against impairment of contract, courts now definitely look to substance rather than to form, realization upon the value or worth of the contract is the concern of the guaranty not that any particular method for that realization shall be observed or preserved." Mississippi is not alone in this ruling. Other states prior to this time have reached similar conclusions.[5] To what may this reasoning be traced? In the Blaisdell[6] decision there is this statement: "It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood or earthquake. See American *Land Co.* v. *Zeiss,* 219 U. S. 47, 55 L. ed. 82, 31 S. Ct. 200. The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts, as is the reservation of all state power appropriate to protect the public interest in the other situations to which we have referred. And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other economic causes." It is obvious that the past several years have had much influence in shaping the trend of the court's thinking.

In what state of uncertainty will those in the future make contracts be putting themselves? Who knows but that the contracts made today will be in-

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[1]Miss. Laws of 1932, c. 251.

[2]U. S. CONSTITUTION, Art. I, § 10.

[3]McCracken v. Hayward, 2 How. 608, 11 L. Ed. 397 (1844).

[4]The court cites as authority for this holding the following decisions: Milner v. Gibson, 249 Ky. 594, 61 S. W. (2d) 273 (1933); Christensen v. Merchant's Bank, 168 Miss. 43, 150 So. 375 (1933); Love v. Mangum, 160 Miss. 590, 597, 135 So. 223 (1931); Home Bldg. Ass'n v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481 (1933).

[5]Dunn v. Love .... Miss. ...., 155 So. 331 (1933).

[6]290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481 (1933).

validated by the law enacted tomorrow? Nevertheless it is true. That clause of the constitution has been ridden over roughshod, and the Government has bowed its head in approval. The same man who fought against the constitutional provision in controversy predicted such a time as this nation is now encountering and warned the people against such act.[7] But even the constitution is no barrier when the public welfare is at stake.

Another question arising from this suit was whether or not by the operation of this plan prejudice had been worked against the depositors. The State Banking Act provides that "Proper provision must be made in the plan for reopening of such banks to pay public depositors, depositors and creditors holding preferred claims and secured claims, and correspondent banks on terms acceptable to them but any arrangement so made shall not operate prejudicially to the rights of the general depositors and creditors of the bank."[8] It is a matter of opinion whether the depositors would receive more under the reorganization plan than under the liquidation proceedings although there was testimony to the effect that in the long run they would realize more. However the proposition is this: Would it be better to proceed with the liquidation thereby curtailing banking facilities? By which method would the depositors receive the most benefit? Should not the public welfare be taken into consideration? The answer to these questions depends upon one's point of view. It must be generally conceded that to close up the bank would be to slow down if not stop business. In such a time as this the burden must be placed where it can best be borne. The courts have decided that under such circumstances no prejudice would be worked. The case of *McConville v. Ft. Pierce Bank & Trust Co.*[9] holds that when three-fourths of the depositors agree to the reorganization of the bank the other one-fourth is bound thereby and are not deprived of equal protection of the law, saying in other words there is no discrimination.

It may be admitted that the rights of all the people have not been taken fully into consideration but it may be pointed out also that once the emergency, which has called forth such action, has passed and readjustment has taken place this case will probably bear no weight with the courts. This is a period of change,[10] revolutionary in its nature.

O. L. CASEY[11]

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[7]Luther Martion in an address to the Maryland House of Delegates set forth his reason for being opposed to such a provision. It was his belief that such regulations had been found necessary in most or all of the states "to prevent the wealthy creditor and moneyed man from totally destroying the poor, though industrious debtor. Such times may again arrive." Taken from the Blaisdell decision 88 A. L. R. 1508 citing 1 Elliot's Debates 344, 376, 377.

[8]Miss. Laws of 1932, c. 251, § 2.

[9]101 Fla. 727, 135 So. 392 (1931).

[10]The interpretation of constitutional principles must not be too literal. We must remember that the machinery of the government would not work if it were not allowed a little play in its joints." A statement cited by Justice Griffith, taken from Bain Co. v. Pinson, 282 U. S. 449, 51 S. Ct. 228, 75 L. Ed. 482 (1932), to add strength to his belief that the constitution must be interpreted in the light of the times.

[11]Through mistake Mr. Casey's name failed to appear at the end of a comment prepared by him appearing in 7 Miss. Law J. 203 on the subject "Implied Warranties in the Sale of Food."

EVIDENCE—BASING OF AN INFERENCE ON AN INFERENCE—FAILURE TO PRODUCE MORE SATISFACTORY PROOF BY DIRECT EVIDENCE

The plaintiff was permitted in the trial court to recover for injuries received while in bathing, alleged to have been caused by the discharges injected by the manufacturing plant of the defendant into the stream at a point some forty-five miles above the place where the plaintiff alleges he was injured. The defendant appeals. HELD: Reversed and dismissed. *Masonite Corporation v. Hill,*..... Miss....., 154 So. 295 (1934).

The plaintiff in the trial court based his case upon a chain of inferences, six in number, so essentially related, so far as the case of the plaintiff is concerned, that the destruction of any one of these inferences would be absolutely fatal to the plaintiff's case. In brief, the facts are as follows: The plaintiff went in swimming in Tallahala Creek, and as soon as the water touched his person, he felt a burning sensation which was communicated to each portion of his body which the water touched. Coming out, he went to his home and bathed with pure water, but his condition grew worse and a physician was summoned. The plaintiff was found with eruptions on his feet and legs which were swollen, and inflamed, and with a high fever. The doctor's diagnosis was that the plaintiff was suffering from the result of a poisonous irritant of some sort which had been applied to his skin. The plaintiff sought to hold the defendant liable upon the following chain of inferences:

(1) The disorder being first felt after the plaintiff entered the water, the water must have caused it.

(2) Since pure water does not cause such an injury, there must have been some poisonous foreign substance in the water as an active cause.

(3) If other persons had been similarly injured in the past, news of such injuries would have been current in that section, and the plaintiff would have heard about them. Therefore it must be that no one had been similarly injured before, thus giving rise to the inference that the poison had been but lately injected into the stream.

(4) Since flowing water tends to rid itself of impurities, the poisonous substance must have been injected into the stream by some agency precipitating large quantities of matter into it.

(5) Since the plant of the defendant is one of the latest established on the banks of the stream or its tributaries, and since it injects large quantities of effluent into the stream, it must be the source from which the poisonous substance came.

Thus the plaintiff made out a case against the defendant, but was here met by evidence introduced by the defendant which seemed sufficient to sever the chain of inferences.

This was to the effect that although the defendant discharges daily from 1,000,000 to 1,300,000 gallons of effluent into the stream, there is nothing in that effluent which is harmful to a human being, whether applied externally or taken internally, save a small quantity of methyl alcohol, shown by proof to be about one drop in a million gallons. This evidence was met by evidence to the effect that, although the original discharges were non-injurious, still, while going down the stream, they underwent certain chemical changes, the nature of which the plaintiff made no attempt to prove. This gives rise to inference number six, (6), that since the discharges, not being harmful, underwent a change and since by tracing back through the chain of inferences, there is found somewhere an inference that the plaintiff was supposedly injured by some harmful substance in

the water, the inference arises that the change taking place in the water must be harmful.

In summing up its opinion in reversing the decision of the trial court, the Supreme Court laid down the following rules of law: (1) The Mississippi Courts will permit the establishment of a case by inference based upon inference, so long as the ultimate inference, measured by legal standards, is, without too much doubt, a safe and dependable probability. (2) No such inference will be permitted to prevail when the fact sought to be established is capable of more satisfactory proof by direct evidence, within the reasonable power of the party upon whom rests the burden of proof.

The first holding is directly in conflict with the weight ot authority. It is generally held, and has been for many years, that the facts upon which an inference may legitimately rest must be established by direct evidence as if they were the very facts in issue.[1] This would unequivocally lay down the rule that a presumption cannot be based on another presumption. This rule was first announced by Mr. Starkie in 1824, more than a century ago.[2]

With all due respect to Mr. Starkie, it must still be admitted that his statement, if taken as a rule, would be perhaps a little too rigid, and that it is not literally followed by those states which nominally conform to it.[3] It will perhaps be interesting to note that in taking this stand, the Mississippi Court is taking a position contra to that of Illinois,[4] although the two jurisdictions are generally in accord.

However, Mississippi is not alone in her holding on this point, for there are in fact two schools of legal thought on the question, and this decision follows the one opposed to that supported by the weight of authority.[5] There are also a number of cases supporting the minority opinion. The difference seems to be in the interpretation of the statement of Mr. Starkie, the minority opinion being that laid in *Chesapeake & Ohio Ry. v. Ware,*[6] which is reasoned as follows: Mr. Starkie's meaning is that all facts, which are proved in a case as if they were the very facts in issue (that is, by evidence of logical, probative value) may serve

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[1]"No inference of law or of fact is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed." Justice Strong; U. S. v. Ross, 92 U. S. 281; 23 L. Ed. 707 (1875). Also:
22 C. J. 84; 10 R. C. L. 870.
Pennington v. Yell; 11 Ark. 212, 236; 52 Am. Dec. 262; (1850).
Dodo v. Stocker; 74 Col. 95; 219 Pac. 222; (1923).

[2]1 STARKIE, EVIDENCE § 57.

[3]"If no fact could be thus ascertained by inference in a court of law, very few offenders could be brought to punishment." R. v. Burdett; 4 B. & Ald. 95, 161 (1920).
"If it is true that courts have frequently stated that a presumption cannot be based on a presumption—; whatever the rule is or ought to be, no authority called to our attention has ever enforced it in the way"—here contended for. Ohio B. V. Co. v. Ind. Board; 277 Ill. 96; 115 N. E. 149; (1917).

[4]Ohio B. V. Co. v. Ind. Board, *supra.*
Globe Acc. Ins. Co. v. Genisch; 163 Ill. 625; 45 N. E. 563 (1896).

[5]1 WIGMORE, EVIDENCE, (2nd. Ed.), 258-260.
1 JONES, COM. ON EVIDENCE, (2nd. Ed.), 625-637.

[6]Chesapeake & Ohio Ry. Co. v. Ware; 122 Va. 246; 95 S. E. 183 (1918). Also:
William v. Wilson; 210 Ala. 289; 97 So. 911; (1923).
City of Indianapolis v. Keely; 167 Ind. 516; 79 N. E. 499 (1906).
Welsch v. Charles Frusch L. & Pl. Co., 197 Iowa, 1012; 193 N. W. 427 (1923).

as the basis from which further inferences of fact may be drawn. All facts in issue are capable of proof by circumstantial evidence. Thus Mr. Starkie's statement really establishes that, when a fact is once proved in a case as a fact, though by inference or circumstantial evidence, such fact itself may then be taken as the basis for a new inference of fact.

Applying this reasoning to the instant case, the minority opinion would lead us to reason that the injury to the plaintiff is an established fact. Since the injury dated from the time of his entry into the water, the inference arises that the cause was the presence of an injurious substance in the water, which thus proved circumstantially, or by inference, becomes an established fact, upon which can be based the inference that the defendant's plant is the agency discharging poisonous matter into the stream. This line of reasoning would thus establish the case in accord with the minority holding, although it would still be subject to attack on the ground of remoteness.

In a jurisdiction adhering to the majority rule and a literal interpretation of Mr. Starkie's promulgation, the ground of attack would be as follows: In the first place, it has not been established as a positive fact that the plaintiff was injured by the presence of some poisonous substance in the water, as it is merely an inference. There might have been some other and intervening cause such as a toxic condition of the plaintiff's blood. Then the inference as to the injurious content of the water is merely an inference based on an inference, as is that one to the effect that the defendant's plant discharged poisonous matter into the stream, or matter which later became poisonous, through the inference of a chemical change.

At first blush, this holding may appear to be contra to the holding of the Mississippi Supreme Court in the case of *Hinman v. Sabin,*[7] but the reasoning of the court in regard to its second principle laid down in the instant case, which will now be discussed, can well be applied to *Hinman v. Sabin,* and will reconcile the two in result, if not in theory of law.

The case of *Hinman v. Sabin* was decided on the point that the court would not permit the presumption that the woman described in the pleading as Mrs. J. E. Sabin was the wife of a man of the same initials. Under the ruling in the instant case, the presumption would likewise be excluded because if the woman were the wife of the man in question, that fact would be capable of positive and direct proof from the records and not necessarily subject to proof only by inference. So the question sifts down to that of the best evidence capable of being presented.

As its second precept in reaching its decision, the court holds that an inference will not be permitted when based on another inference if that inference is capable of more satisfactory proof by direct evidence, within the reasonable power of the party bearing the burden of proof. This is a qualification of the first precept laid down by the court in its abrogation of the general rule. It is on this ground that the court reversed the decision of the trial court in favor of the plaintiff, although it would seem that the first rule, if applied, would be sufficient to warrant a reversal; for certainly the chain of inferences upon which the plaintiff seeks to hold the defendant liable are never sufficiently proven or established to justify their acceptance as established facts sufficient to form the basis for a new inference of fact, under the rule laid down in *Chesapeake & Ohio Ry. Co. v. Ware,* cited above.

In the application of this second precept, the court held that one of the

[7] 147 Miss. 509; 112 So. 871 (1927).

essential links in the chain was the inference that the water contained some chemical content poisonous to the human body. This fact, if it were a fact, could have been proven by a chemical analysis of the water. The state maintains means whereby such analysis can be made without cost, or at only a nominal cost. This would also be the means of proving demonstrably that the non-poisonous effluent discharged by the plant of the defendant had undergone the alleged poisonous change while in the stream. Failure to produce such direct and more satisfactory proof gives rise, on its own part, to the inference that such evidence, if produced, would be unfavorable to the stand taken by the party bearing the burden of proof. The failure of the plaintiff to avail himself of this means of offering to the court such conclusive proof of the presence of poison in the water gives rise, in its turn, to the presumption that, in the language of the court, "turns the scales of judicial decision in favor of the defendant."

It may also be worthy of note that the court takes judicial notice of the fact that methyl alcohol in great dilution is not injurious to mankind. This fact is indicative of the extent to which enlightenment and learning have progressed, as our courts have not always been willing to take judicial notice of such facts wholly technical in their nature.

The court cites no cases in supoprt of its doctrine concerning the possibility of positive proof, but its reasoning appears to be sound and well-grounded.

The language which the court uses in summing up its holding is a little too vague for the decision to have the strength it should, in view of the fact that it sets a precedent in this jurisdiction on this point of evidence. It says: "We shall allow in this jurisdiction the establishment of a case by inference upon inference so long as the ultimate inference, measured by legal standards, is, without too much doubt a safe and dependable probability." When a statement contains more than two variables, it is incapable of accurate intepretation. In this statement, there are three variables. "Safe" and "dependable" are terms, the definitions of which, in a legal sense, must depend entirely upon the conception of the court. What one authority considers safe and dependable, another might not. "Probability" is surely a variable term. The answer to the question as to whether or not there is "too much doubt" can exist only in the mind of the court, to be negatived or affirmed at its discretion.

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